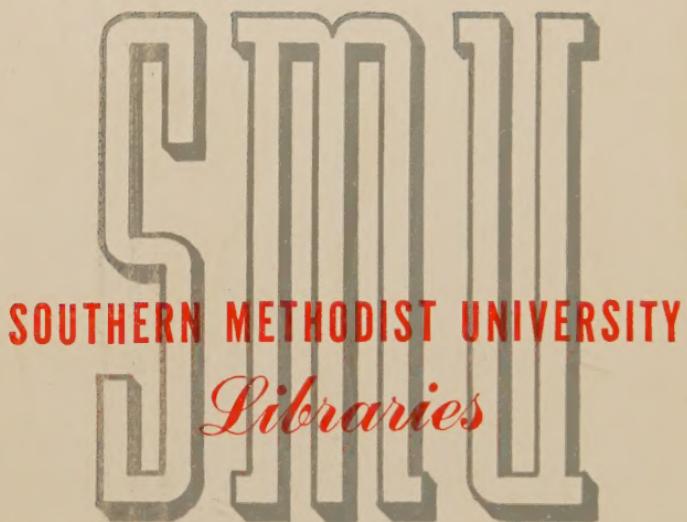


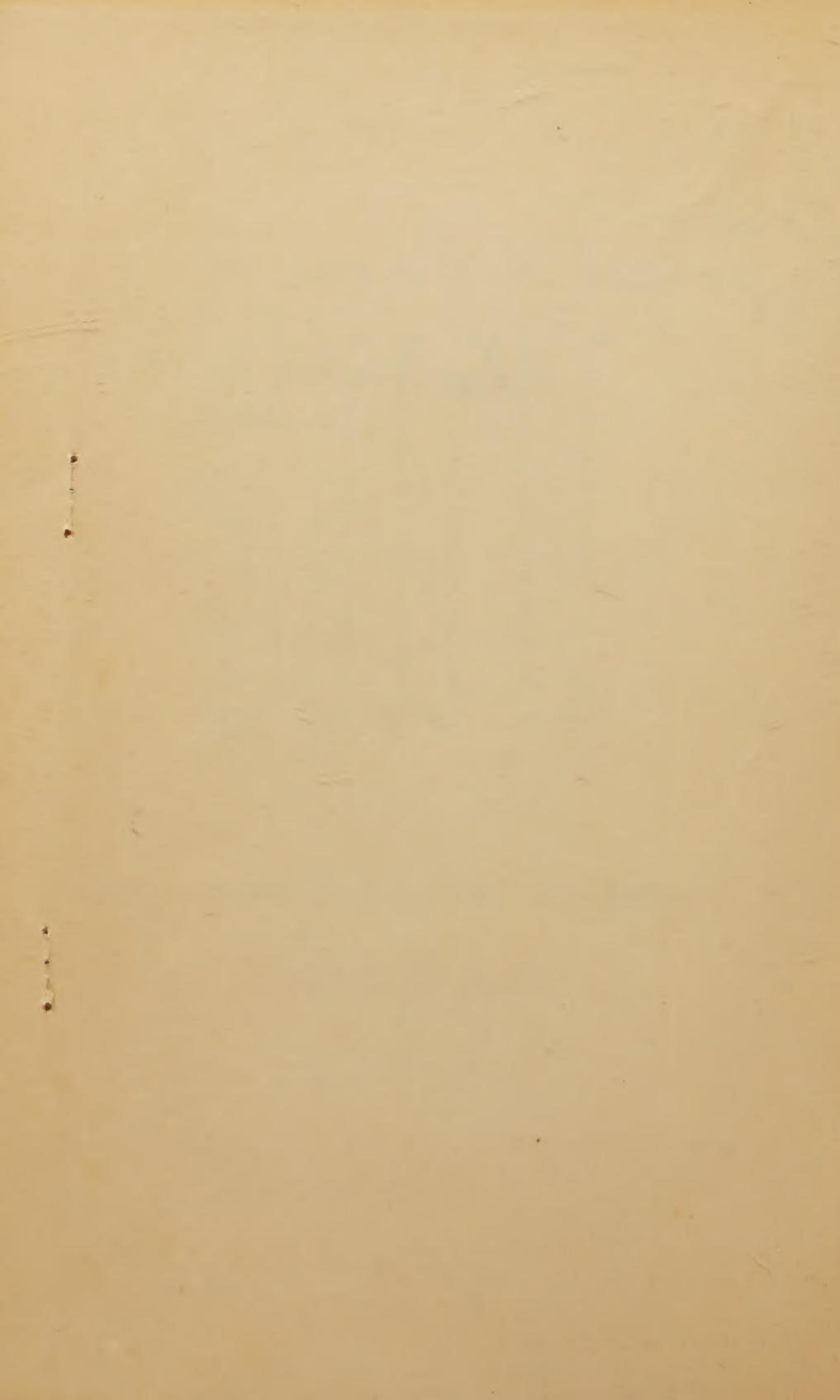
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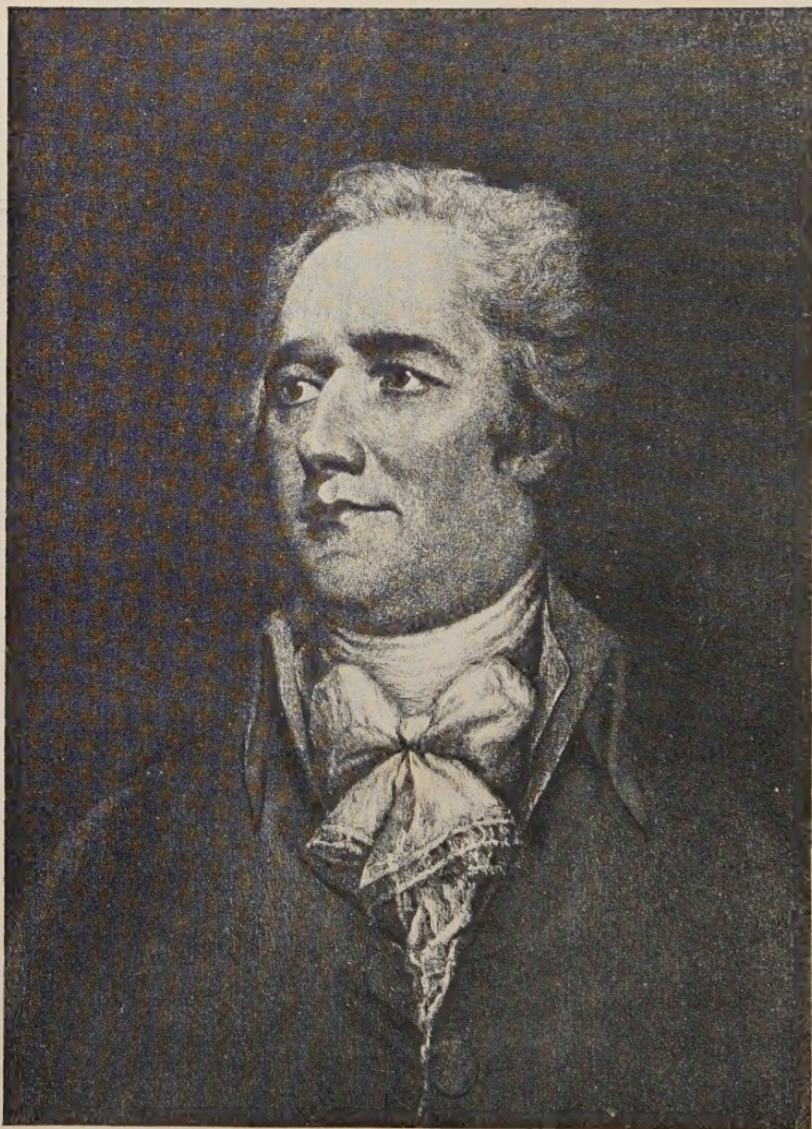
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ALEXANDER HAMILTON

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# If Hamilton Were Here Today

American Fundamentals  
Applied to Modern Problems

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"Look unto the rock  
whence ye are hewn."

By  
**Arthur Hendrick Vandenberg**

Author of  
"The Greatest American, Alexander Hamilton"

**G.P. Putnam's Sons**  
New York & London

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ALEXANDER HAMILTON INSTITUTE  
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through which the most illustrious  
name in American History inspires  
the pursuit of practical business  
knowledge and better citizenship

THIS VOLUME IS DEDICATED



## Foreword

“Look unto the rock whence ye are hewn, and to the hole of the pit whence ye are digged.”—Isaiah: 51, 1.

“It is impossible for the man of pious reflection not to perceive in the Constitution, a finger of that Almighty hand which has been so frequently and so signally extended to our relief in the critical stages of the Revolution.”—*The Federalist*, No. 37.

ALEXANDER HAMILTON was the master craftsman of American Government. He crowded into one short life more dynamic service to the American foundation than any other patriot who ever lived. He was the inspired oracle of the Constitution. His lucid exposition of its purposes, his matchless interpretation of its spirit, his implacable determination to save it—and, through it, to save a stumbling people from the tragedy of disintegration—were the dominant factors in the creation of the Republic. He clearly saw that ordered freedom required protectorate. He first convinced his countrymen that the Constitution established this dispensation upon secure foundations, solid as the

eternal hills; and then he proceeded to bulwark these foundations with all the resource and all the genius of his apostolic might.

More than a century has intervened. The unfledged Nation which he tended with paternal love and unselfishness, has grown to powerful stature with the years. The same old Constitution has served it in all the vicissitudes of time. The same old foundations have held constant and dependable for succeeding generations of Americans. But the ties of fidelity to these basic birth-rights have been seriously weakening, appreciative comprehension of their unbroken values has been dulled, as modern citizenship—much of it alien in blood—has found a constantly widening chasm between the impatient present and the monitory past. One great National organization has made the recent statement—as shocking as it probably is true—that “if it could be submitted to a ballot, a large number of our citizens would vote in favor of abolishing the Constitution entirely.”<sup>1</sup> A Declaration of War against us by a powerful, foreign foe could not

<sup>1</sup> The report of the American Bar Association’s Committee on American Ideals, San Francisco Convention, 1922. *The Federalist*, No. 17, warned: “It is a known fact in human nature, that its affections are commonly weak in proportion to the distance or diffusiveness of the object.”

threaten fate that would be half so dire as the possibilities wrapped in this dark prophecy.

Ordered freedom still requires protection. We have outgrown primitive inconveniences; but we have not outlived fundamental necessities. The immutable foundations of the Constitution are, if anything, more essential to the complex relations of one hundred million people than they were for the comparatively simple needs of three million people in the days when America was young. If the rally cry of yesterday was "Forward to the Constitution"—how the Nation rang with this progressive apostrophe forever on the lips of Hamilton!—to-day's shibboleth should be "Back unto the Rock whence ye are hewn"! The wisdom of the Founders, like truth, is constant through all time. If Hamilton was indispensable in 1787 to lead Reason to her democratic throne, he is impressively required in 1923 to maintain her scepter against the heresies of a radical and thoughtless age which boasts an independence, as dangerous as it is blind, of precedent and tradition and experience. Even the most restless among the votaries of Constitutional destruction should be glad to pause with such an honored counselor, to whom every honest American must acknowledge himself in eternal debt. Having paused—and

listened—"happy will it be if our choice should be directed by a judicious estimate of our true interests, unperplexed and unbiased by considerations not connected with the public good."<sup>1</sup> Wherefore, this book shall hazard to inquire what Hamilton if he were here to-day would say—and do—in relation to the letter and the spirit of the Constitution.

But, it will be immediately interposed, who knows what Hamilton would say and do, if a blessed miracle could restore his wisdom, his prescience and courage to the modern guidance of America? By what right shall any unordained expositor assume to commit him in the disagreements which divide and aggravate the minds of men to-day? The question should be asked—and answered.

It would be unpalliated presumption for any living interpreter—a century removed from personal contacts with George Washington's co-worker in the emancipation and the organization of America—to subscribe Hamilton's endorsement to any proposition not clearly approved by the detailed doctrines wrought in his own time. It would be a particularly vicious trespass upon a great

<sup>1</sup> This verbatim sentence in *The Federalist*, No. 1, was among the first admonitions addressed to the citizens of long ago.

memory, to accredit partisanship to him in any of the casual problems, essentially our own, which bear no direct kinship to fundamentals that are the same in every age. But it is no speculation to speak for Hamilton in relation to the menaced spirit of the Constitution. It is no presumption to place him, once more, at the summit of the Republic's defenses, repelling those who would trade the checks and balances and guaranties of a Representative Government for the shifting and reckless uncertainties of a pure democracy. It is no trespass to bring him into renascent challenge to those restive forces, in this uncertain period of flux, which would substitute repudiated political experiments for the established modes that wisdom recommended and experience has vindicated. It is no transgression to idealize him in the thick of unremitting battle against all modern Constitutional treacheries and delinquencies. On the contrary, he would consider that he lived and died in vain and that his poor memory was shorn of its last, sympathetic friend, if any Constitutional crisis, great or small, ever shall arise in the story of the United States, in which it should be undenied that he could ever countenance, by the timidity of silence, so much as a single gesture against the Constitutional Rock whence we are hewn.

What Hamilton would say and do, in these respects, stands forth as indubitably clear as noon-day sun in cloudless sky. He lived a philosophy of Constitutional fidelity which permits of no misunderstanding. He created a Constitutional literature which none but charlatans could misconstrue. He believed in the genius of American Government, as founded by himself and his compatriots, with a reasoning passion which never compromised with adventurers or demagogues. He gave his great brain and heart and soul to the consolidation of these ideals, with a selflessness and probity that have few parallels. He would be as constant to-day as he was yesterday. Nothing could be surer than the character of his modern counsels; and nothing could serve healthier utility than to have these counsels honestly appraised, by modern Americans, all too many of whom have forgotten—sad to confess—that such an heroic fore-bear ever served supreme emergency.

But credentials for these observations and these warnings may be even more closely verified. The complete scope of Hamilton's Constitutional beliefs was unequivocally set down in the famous *Federalist Papers*—the embattled essays which drove recalcitrant New York State into the Constitutional fold, at the end of an historic conflict,

against superhuman odds, in which Hamilton's incorrigible tenacity was all that saved The Great Experiment from death a-borning. The entire, correct theory and design of American Constitutional Government is set down in these great Papers, under seal of Hamilton's creeds. Nothing need be taken for granted or left to the imagination. Here is everything, in luminous particularity. So, to avoid divertive arguments which might question an interpreter's authority in weasel effort to blunt the force of his conclusions, not otherwise to be attacked, we substantially confine our gospels to paragraphs and phrases taken from *The Federalist*, as set down by the author in his own burning words. Some two hundred separate and distinct applications of verbatim Federalist philosophies thus are made. The modern condition, brought to answer to Federalist rule, may be different in its aspect; but in principle it is the same, and, upon these principles, *The Federalist Papers* speak for their own author who made them the mirror of his faith. In such circumstance, what Hamilton would say and do, if he were here to-day, becomes as sure as truth—and as vital to the perpetuity of our ordered liberties as he was, in his own time, to the establishment of our inheritance.

As *The Federalist*<sup>1</sup> declared in the beginning, so we may well repeat to-day: "The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the Union, the safety and the welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world." What it lacks in the flash of easy reading, it makes up in the stern import of the faithful citizen's obligation to his country. "If the road over which you will have to pass should in some places appear to you tedious or irksome, you will recollect that you are in quest of information on a subject the most momentous which can engage the attention of a free people, that the field through which you have to travel is in itself spacious, and that the difficulties of the journey have been unnecessarily increased by the mazes with which sophistry has beset the way."<sup>2</sup> Hamilton would not be approved to-day, by intemperate faction which snarls at the restraints differentiating between liberty and license. No more can this reflection of his stalwart faiths anticipate applause in forums that ring to the doctrines of communistic change. *The Federalist*, Down-to-date, like its illustrious predecessor,

<sup>1</sup> No. 1.

<sup>2</sup> *The Federalist*, No. 15.

“solicits the attention of those only who add to a sincere zeal for the happiness of their country, a temper favorable to a just estimate of the means of promoting it.”<sup>1</sup> If such as these ever fail to number an American majority, the fruits of liberty will turn to ashes on our lips. We shall have sacrificed the benefit of grace bestowed by the final prayers of Washington who proclaimed he “carried to his grave” unceasing vows that “Heaven may continue to you the choicest tokens of its beneficence . . . and that the free Constitution, which is the work of your hands, may be sacredly maintained.”<sup>2</sup>

We are warned by our own authorities—by both Hamilton and *The Federalist*—to avoid intemperance in assessing motives to those with whom we Constitutionally disagree. With a fine spirit of American fair-play, neither understood nor emulated by the adversaries with whom he fought, Hamilton urged that it would be disingenuous to resolve indiscriminately against the purposes of an opposition. “Candour will oblige us to admit that even such men may be actuated by upright intentions; and it cannot be doubted that much of the opposition which has made its appearance, will

<sup>1</sup> *The Federalist*, No. 37.

<sup>2</sup> Farewell Address.

spring from sources, blameless at least, if not respectable—the honest errors of minds led astray by preconceived jealousies and fears. So numerous, indeed, and so powerful are the causes which serve to give a false bias to the judgment, that we, upon many occasions, see wise and good men on the wrong as well as on the right side of questions of the first magnitude to society. This circumstance, if duly attended to, would furnish a lesson of moderation to those who are ever so much persuaded of their being in the right in any controversy. And a further reason for caution in this respect might be drawn from the reflection that we are not always sure that those who advocate the truth are influenced by purer principles than their antagonists."<sup>1</sup> All these homilies, of course, are true; and those who risk the responsibility of bringing *The Federalist* Down-to-date, must be prepared to exercise similar, generous constraints. But some conspiracies against the Constitution are so obviously born of tainted purposes, that occasional recurrence to strong language is inevitable. So long as it be the exception rather than the rule, it will be justified by precedent—because even *The Federalist*, with all its charity, did not repress an occasional blast of anathema against the

<sup>1</sup> *The Federalist*, No. 1.

“ravings” of those persons who imagine that “their art or their eloquence can impose conceits and absurdities upon the people of America for infallible truths.”<sup>1</sup>

It is unfortunately true that those who “despise and condemn the Constitution have in the past ten years had more earnest students of their vicious doctrines than those who uphold the Constitution and prize their liberties which the Constitution guards and protects.”<sup>2</sup> It has become quite the supercilious and disrespectful mode to spurn the Constitution as nothing more than “the political wisdom of dead America.”<sup>3</sup> As if the laws of gravity were defunct because Newton is physically past and gone! Threat after threat to the genius of the Constitution is disclosed in contemporary deflections, submitted to analysis and answer upon subsequent pages. It is a familiar error to mistake all change for progress. But a majority of the American people—once aroused to the verities, and reminded of their vitality—will not yield to these subtle lures. “No reliance upon the National character has ever been betrayed,” Vice-President

<sup>1</sup> *The Federalist*, No. 29.

<sup>2</sup> *The Short Constitution*, by Wade and Russell, 211.

<sup>3</sup> *The New Democracy*, by Walter E. Weyl, 13. This book adds: “The greatest merit—and the greatest defect—of the Constitution is that it has survived.”

Calvin Coolidge has declared.<sup>1</sup> "It is time," he adds, "to supplement the appeal to the Law, which is limited, with an appeal to the spirit of the people, which is unlimited." As another proctor puts it: "Men and women need to be reminded that the duty of upholding the Constitution does not devolve upon the Supreme Court alone; it rests upon all departments of government, and, in the last analysis, upon the people themselves."<sup>2</sup> *The Federalist*<sup>3</sup> knew human nature when it said: "Man is very much a creature of habit; a thing that rarely strikes his senses will generally have but little influence on his mind." The Constitution serves most of us so successfully that we rarely give it a second thought. We accept its guaranties as a sort of automatic benediction which we have always had, and always will have—never stopping to remember that whatever man has made, man can destroy.

The truth is that "in reviewing the centuries of history prior to the founding of the Republic of the United States of America, we find no country to which the historian can point and truth-

<sup>1</sup> Address at American Bar Association, 1922 Convention, San Francisco.

<sup>2</sup> *Our Changing Constitution*, by Charles W. Pierson, 17.

<sup>3</sup> No. 27.

fully say: There was a government that worked well."<sup>1</sup> The truth equally is that this achievement, now copied into the lives of many other grateful peoples, rests upon the bases of the Constitution, the rock whence we are hewn. It is time these truths had dominant reiteration. They need to be reintroduced into the program of American thought—an antidote to the nostrums of politico-medicine-men "who hope to aggrandize themselves by the confusions of their country,"<sup>2</sup> or who cherish unsteady zeals that violate the mandates of history and experience. They need to be compulsory in the curricula of all American schools. "Our remedy lies in a return to those clear principles of reason and honor embodied in our Constitution. Its spirit is America's carrying the fervor of war into the practice of peace. There is the spirit of the Fathers in its pristine purity."<sup>3</sup> Justice Story published his famous *Commentaries on the Constitution of the United States* in 1833—a timely challenge for the re-birth of Constitutional fidelities, at the end of forty years of stormy Constitutional argu-

<sup>1</sup> *Back to the Republic*, by Harry F. Atwood, 14.

<sup>2</sup> *The Federalist*, No. 1.

<sup>3</sup> Letter, September 15, 1922, published in *New York Times*, written by Gertrude Atherton, author of *The Conqueror*, the romance of Hamilton's life.

ment. It was a belated but invaluable appendix to *The Federalist Papers* which had initiated these faiths half a century before. In lieu of any such surpassing contribution to the equivalent necessities of our own time, is there not utility in at least bringing *The Federalist* down-to-date, and examining its recommendations to these problems of to-day?

To be a Constitutionalist—such as Hamilton would be, if he were here to-day—one does not need to wall up his mind and worship the American Charter as a thing utterly inviolable against the touch of temporal hands. Hamilton himself was not wholly satisfied when the Constitutional Convention had finished its labors. But, broad-mindedly and with the spirit of true democracy in his soul, he subscribed unreservedly to the completed document because it was the will of a representative majority, and because there was no better alternative. Gladstone's tribute to the Constitution—"the most wonderful work ever struck off at a given time by the brain and purpose of man"—was not literally applicable at the time of its inception; but it has become unequivocally true, with the passing of the decades, because nothing short of "the most wonderful work" could have served changing American conditions with

such brilliant, God-blessed advantage as has the Constitution. And if Hamilton could take it to his heart so faithfully when it was but an experiment, what would he do to-day when it has one hundred and thirty years of history to vindicate its authorship? If there was no better alternative then, how much less is there a better alternative now! It was the result of compromise in the beginning.<sup>1</sup> To-day it is the seasoned product of history and experience!

It is no infidelity to admit that Constitutional applications have grown and developed—changed, if you want to insist upon that word—with the changing conditions of America. On the contrary, it is supreme compliment to acknowledge that the Constitution has proven equal to any American emergency. Suppose it be true that “there was little or no belief in the unlimited capacity of the plain people to manage their own Government” in the beginning, and that “faith in the political capacity of the plain people did not exist among

<sup>1</sup> *The Short Constitution*, by Wade and Russell, 71, points out that the debates in the Constitutional Convention reveal 223 allusions to the government and institutions of other countries, the most important of which were the following: 130 allusions to England, 19 to France, 17 to the German States, 20 to Holland, 25 to Greece, 26 to Rome.

the plain people themselves.”<sup>1</sup> It is equally true that the Constitution was written to serve no objective other than the popular welfare, and that, with the splendidly expanding “political capacity of the plain people,” it has amply served every legitimate expansion of democracy. James Bryce, in his great work upon *The American Commonwealth*, has said that “the Constitution has changed in the spirit with which men regard it, and therefore in its own spirit”; but he has also said that “it ranks above every other written Constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity and precision of its language, its judicious mixture of definition in principle with elasticity in details.” This distinction between principle and details must be clearly borne in mind. It is the root of the whole problem. Changes in Constitutional applications “in no manner abridge the fact of its changeless nature and meaning.”<sup>2</sup> The solemn mandate upon the country is to protect and preserve this changeless nature in respect to fundamentals. The menace is in trends that

<sup>1</sup> *Steps in American Democracy*, by Andrew C. McLaughlin, 71.

<sup>2</sup> Supreme Court language in *South Carolina v. U. S.*, 199 U. S. 437.

depart therefrom. "The conditions that have been wrought through these departures, this reckless agitation, and the enactment of approximately fifteen thousand new statutes each year, have had a disastrous effect upon this country and resulted in greatly lessening our influence for good in other countries. We have drifted from the Republic toward democracy; from statesmanship to demagogism; from excellent to inferior service. It is an age of retrogressive tendencies."<sup>1</sup>

Many earnest literalists are particularly concerned over pronounced tendencies to concentrate more and more authority in the Federal Government, and proportionately to derogate the authority of the States. One such flatly declares that "Hamilton was mistaken when he predicted in *The Federalist* that the National Government would never encroach upon the State authorities." We quote further: "Some profess to view the recent encroachments of the Federal power as a triumph for the principles advocated by Hamilton and Marshall. . . . Such a claim does both an injustice. While they both stood for a strong National Government, neither of them contemplated any encroachment by that Government on the principle of local self-government in local matters or the

<sup>1</sup> *Back to the Republic*, by Harry F. Atwood, 20.

police powers of the States. . . . Hamilton devotes an entire issue of *The Federalist* to combatting the idea that the rights of the States are in danger of being invaded by the General Government, . . . and concludes that it is to be hoped that the people 'will always take care to preserve the Constitutional equilibrium between the General and the State Governments.' . . . Some will say that this is an age of progress and we are improving upon Hamilton. Others, however, think we are forgetting the wisdom of the Fathers."<sup>1</sup> All of these observations are defensible. The rising tide of paternalism runs counter to the express theory of the Constitution. Chief Justice Chase, in the Supreme Court, once epitomized the correct rule: "The Constitution in all its provisions looks to an indestructible Union, composed of indestructible States."<sup>2</sup> The tendency toward excessive centralization is the usual concomitant of war. Successful war requires "unified command" in very far-reaching senses. But for every such tendency there is a subsequent revulsion. Ten years after the Rebellion, the country tired of the extensions and sometimes of the usurpations of Federal authority and reverted to the "Constitutional equilibrium,"

<sup>1</sup> *Our Changing Constitution*, by Charles W. Pierson, 83, 84, 143, 144.      <sup>2</sup> *Texas v. White*, 7 Wall, 700.

signalized in 1873 by the decision of the Supreme Court in the famous "Slaughter-house Cases."<sup>1</sup> History will repeat itself. The effectual maintenance of State units within their legitimate Constitutional sphere is essential to the American system. People cannot be governed at a distance, in their intimate concerns. On the other hand, there are some advantages in the growth of a healthy National conscience; there are certain very decided advantages in uniformity of laws as between peoples divided only by imaginary, State, boundary lines; and there is nothing in the true spirit of the Constitution which would ever insist upon the arbitrary maintenance of a State's rights, to the disadvantage of the whole common weal. Hamilton was essentially a Nationalist. His paramount concern, like Lincoln's, was the perpetuity of Union under the unbroken Constitution. If he were here to-day he would unquestionably demand scrupulous attention to the maintenance of a legitimate "Constitutional equilibrium" between General and State Governments: but he would find vastly greater menace in other and more seriously subversive directions. Wherefore, *The Federalist* down-to-date, digging the deeper furrow, confines itself to three fundamental propositions.

<sup>1</sup> 16 Wall, 36.

(1) The Government of the United States is a Representative Republic and not a pure Democracy. The difference is as profound to-day as it was when the foundations of the Constitution were set in the ages. "The terms 'Republic' and 'Democracy' are thoughtlessly and inaccurately used almost synonymously in dictionaries, in encyclopedias, and in political literature and discussion. This country is frequently spoken of as a democracy, and yet the men who established our Government made a very marked distinction between a 'Republic' and a 'Democracy,' gave very clear definitions of each term, and emphatically said they had founded a Republic . . . which is the golden mean between Autocracy and Democracy."<sup>1</sup> The most serious of all modern dangers to the Constitution, and, therefore, to the welfare of the American people, are traceable to neglect of these distinctions. *The Federalist*<sup>2</sup> is particularly explicit in its admonitions upon this score. "A pure democracy" consists of "citizens who assemble and administer the Government in person"; in other words, it smacks of the commune. "Such democracies have ever been spectacles of turbulence and contention; have ever been found

<sup>1</sup> *Back to the Republic*, by Harry F. Atwood, 22.

<sup>2</sup> No. 10.

incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths." In whatever degree we attempt to inoculate the Constitution with this virus, we invite a lethal fever; and this very thing is going on, round about us, all the time. On the other hand, "a Republic," continues Hamilton, "by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. . . . The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations. . . . The effect of the second difference is that, even though men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, obtain the suffrages and then betray the interests of the people, yet the extent and expanse of the Republic and the size of its electoral units will minimize this danger." We are a Representative Republic. We are not a pure Democracy. The very size of the Nation repels the possibility

of advantage from the latter scheme. If it was impractical in 1787, it is some thirty times more impractical to-day. Yet we are constantly trying to graft the latter on the former; and every effort that we make in this direction, with but few exceptions, is a blow aimed at the heart of the Constitution.

Dr. Nicholas Murray Butler, President of Columbia University, says, in his *Why Should We Change Our Form of Government*:

“The Representative Republic erected on the American Continent under the Constitution of the United States, is a more advanced, a more just and a wiser form of government than the socialistic and direct democracy which it is now proposed to substitute for it. . . . To put the matter bluntly, there is under way in the United States at the present time a definite and determined movement to change our Representative Republic into a socialistic democracy. That attempt, carried on by men of conviction, men of sincerity, men of honest purpose, men of patriotism as they conceive patriotism, is the most impressive political factor in our public life of to-day. . . . This attempt is making while we are speaking about it. It presents itself in many persuasive and seductive forms. It uses attractive formulas to which men like to give

adhesion: but if it is successful, it will bring to an end the form of government that was founded when our Constitution was made, and that we and our fathers and our grandfathers have gloried in."

If we are to desert the charts of American political experience, if we are to fling the genius of Constitutional Government to oblivion, if we are to experiment in hypothetical invention which pretends that it invites millennium, let us do it with open eyes and with the knowledge that we deny the pleadings of wisdom that has withstood a century of acid test. Well may *The Federalist*<sup>1</sup> ask to-day as it did in the original crisis: "Is it not time to awake from the deceitful dream of a golden age, and to adopt as a practical maxim for the direction of our political conduct that we, as well as the other inhabitants of the globe, are yet remote from the happy empire of perfect virtue? Have we not already seen enough of the fallacy and extravagance of those idle theories which have amused us with promises of an exemption from the imperfections, weaknesses and evils incident to society in every shape?"

(2) The Government of the United States is a Government safeguarded by checks and balances which refuse to any one department the privilege

<sup>1</sup> No. 6.

or opportunity of autocratic power. A chain is no stronger than its weakest link. Any fracture to any portion of this vital system of checks and balances is a breach of the system itself, and invitation to political oligarchy. Yet, in the false name of greater liberty, the people are constantly solicited to meditate this sort of blow to the very essence of Constitutional liberty. The most casual study of numerous "progressive" notions vogue to-day, will demonstrate that they are not actually progressive at all; but that the effect of their injection into government would be to put us back into ancient and reactionary conditions which the framers of the Constitution sought to cure. "Friends of progress sometimes forget that the real forward-looking man is he who can see the pit-fall ahead as well as the rain-bow; the man of true vision is one whose view of the stars is steadied by keeping his feet firmly on the ground."<sup>1</sup> The greatest Progressive of modern times, Theodore Roosevelt, was at heart an unswerving Constitutionalist. The greatest Progressive of the days of the foundation, Alexander Hamilton—if it be "progressive" to blaze new trails of freedom out of the maze of the Dark Ages—was uncompromising

<sup>1</sup> *Our Changing Constitution*, by Charles W. Pierson, 148.

in kindred faiths. It is the business of America ceaselessly to hunt new development in the expansion of human rights; but it is poor service to this exalted purpose, to forsake the ground-work of the Charter under which human rights have advanced farther in a single century than they did in all the preceding vastnesses of time.

(3) The Government of the United States is, in the last analysis, a reflection of the spirit of the people who are its sovereigns. If the people yield themselves to the pursuit of class advantage, the Government will soon partake of these same infirmities. If faction sways the multitude, it will soon capture their institutions. Respect for human rights, respect for property rights, respect for communal rights, must inspire the citizenship if these blessings shall continue to find sanctuary in an unblemished Constitution. The stream can rise no higher than its source. Yet we see class selfishness, and faction, and caste, and bigotry organizing upon every side—organizing always in the name of the Constitution, but organizing always against the real, fundamental elements of that equality which is the trade-mark of America. Against them the warnings of *The Federalist* down-to-date must veritably thunder; because *The Federalist* of yesterday put the bar sinister upon every one.

These, then, are our pursuits. They cannot but commend themselves to the attention, even though they sometimes fail the approval, of all men and women who combine earnestness with good conscience in their approach to the responsibilities and the obligations of good citizenship. Hamilton, the individual, is of small consequence in these considerations. But Hamilton, the major author of the greatest exposition of the Constitution ever penned, the acknowledged mouthpiece of Washington who presided over the body which gave the Constitution birth, the advance apostle of the puissant doctrines through which Marshall made the Constitution articulate, the composite oracle of the Constitution itself, deserves faithful consultation by those who would preserve intact the Constitutional blessings which are our priceless heritage.

In developing this theme, I have freely invoked a multitude of references, with scrupulous desire to credit every quotation. Probably some errors are inevitable, particularly when a layman's discussion must invade the tomes of Law. I can only hope that they prove to be an inconsequential minimum, and that the sincerity of purpose behind every argument may condone such inadvertencies. I particularly acknowledge the valuable informa-

tion contained in Charles Warren's three volumes upon *The Supreme Court in United States History*.

Though stalwart, Hamiltonian Constitutionalism seems indubitably written in the records of American history, beyond chance for misconception, it is with some trepidation that I make positive application of his faiths. The memory of Hamilton belongs to the whole Nation, and some of those who love this memory, may reasonably object that any one expositor should presume to renew his presence in the maelstrom of modern events. But I make bold to believe that the end justifies the means. Two years ago, in a preceding volume, I undertook to demonstrate that, all things considered, Hamilton is "The Greatest American" who ever lived. If he so much as approximates such stature, his influence is sadly needed amid modern trends that challenge every tenet of his masterful philosophy. Indeed, it would be negligent ingratitude not to inquire what he would say and do if he were here to-day; and he himself would be the last to complain that his post-mortem influence should be rallied to the preservation of this Constitutional Republic which, abjuring all lures and deceits, is destined to move on and on into greater glories and ever greater service to

human-kind. In this humble but patriotic spirit, let us "look unto the Rock whence we are hewn, and to the hole of the pit whence we are digged."

ARTHUR HENDRICK VANDENBERG.

EDITOR, *The Herald*,  
GRAND RAPIDS, MICHIGAN,

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**IF HAMILTON WERE HERE TO-DAY**



## Worthy Counselors

“The ideas of a statesman like Hamilton, earnestly bent on the discovery and inculcation of truth, do not pass away. Wiser than those by whom he was surrounded, with a deeper knowledge of the science of government than most of them, and constantly enunciating principles which extended far beyond the temporizing policy of the hour, the smiles of his opponents only prove to posterity how far he was in advance of them.”—*George Ticknor Curtis*.

“*The Federalist* is a complete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth.”—*Chief Justice John Marshall*.

THE initial inquiry, in a discussion of this nature, is entitled to ask whether the two great authorities upon which it rests its case, are worthy the formidable consideration thus demanded of modern citizenship. One eloquently convincing answer is that the question would not need to have been examined a century ago when America was nearer, in time and contact, to the quarrying of “the rock whence we are hewn.” In those vivid days, when the lengthened shadow of post-Revolutionary

crisis still lay upon the land, neither the consummate sagacity of Alexander Hamilton, nor the Constitutional orthodoxy of *The Federalist* would have been a novelty to any literate person beneath the Flag.

So long as men still lived who had suffered through the Republic's anxious travail, there were innumerable, friendly witnesses to testify, with Justice Story of Supreme Court that "Hamilton was the greatest and the wisest man of this country," and even foes to consent, with Jefferson, that "Hamilton is really a colossus," or with Burr, that "he who puts himself on paper with Hamilton is lost." Similarly, while the spell of original Constitutional convincement still lingered with its devotees, there were ample critics to agree with *The Edinburgh Review*<sup>1</sup> that "The *Federalist* . . . exhibits an extent and precision of information, a profundity of research, and an accurateness of understanding, which would have done honor to the most illustrious statesman of ancient or modern times."

In still later periods, before liaison with the days of the foundation had been wholly lost, there continued to be historical assessors like Daniel Webster to tell how "Hamilton touched the dead corpse

<sup>1</sup> No. 24.

of the public credit, and it sprang upon its feet," and like Roscoe Conkling, to declare "he was the greatest man ever produced by this hemisphere." Likewise, before the literature of the Constitution had ceased to draw inspiration from the fountain-head, there were journals, like Blackwood's *Magazine*<sup>1</sup> to honor *The Federalist* with due regard: "It is a work altogether which, for comprehensiveness of design, strength, clearness and simplicity, has no parallel; we do not even except or overlook Montesquieu and Aristotle among the writings of men."

Always, meanwhile, there have been philosophers and publicists ready to put just estimate upon the Apostle and his Gospel of the Constitution. Thus Guizot: "Hamilton must be classed among the men who have best known the vital principles and fundamental conditions of Government; there is not in the Constitution of the United States, an element of order, of force, or of duration, which he has not powerfully contributed to introduce into it and to give it a predominance." Or John Fiske: "His intellect seemed to have sprung forth in full maturity, like Pallas from the brain of Zeus." Or Chancellor Kent: "I have little doubt that if General Hamilton had lived twenty years longer,

<sup>1</sup> January, 1825.

he would have rivaled Socrates or Bacon, or any of the sages of ancient or modern times, in researches after truth and in benevolence to mankind." Or Talleyrand: "I consider Napoleon, Fox and Hamilton the three greatest men of our time, and if I had to choose between the three, I would give without hesitation the first place to Hamilton." Or James Bryce: "Equally apt for war and civil government, with a profundity and amplitude of view rare in practical soldiers or statesmen, he stood in the front rank of a generation never surpassed in history." Or Fiske again, referring to *The Federalist*: "It was a literary monument great enough for any man and any nation."

But the twentieth century, speaking now in terms of mass familiarity, remembers few of these things. It is a curious example of ingratitude, to what an extent Hamilton is a practically forgotten name in many quarters and *The Federalist* is principally a legend. The one is a vague recollection connected with a duel; the other, a musty tract for some bookworm's study hour. Small wonder that the Constitution sometimes wants for sympathetic and understanding allies, when its "first friends"—Hamilton and *The Federalist*—are so largely lost to modern intimacies! But the renaissance may prove to be simultaneous. That of the former certainly

must follow close upon the latter. They are as inseparable as the Union—the Constitution, Hamilton, and *The Federalist*. President Harding has correctly said<sup>1</sup>: “The greater modern familiarity with Hamiltonism may become, the greater will be modern fidelities to essential American institutions.”

These, then, are our authorities; and a momentary attention to the detail of their credentials will determine whether they are worthy counselors, and will make modern America more impressionably alert to their joint admonition: “Every man who loves peace, every man who loves his country, every man who loves liberty, ought to have it ever before his eyes, that he may cherish in his heart a due attachment to the Union of America, and be able to set a due value on the means of preserving it.”<sup>2</sup>

First, the Man! The Man to whose memory a belated statue soon will rise upon the plaza of the Treasury Department in Washington—a statue upon the base of which, if the recommendation of the author of this book were followed, would appear

<sup>1</sup> Dedicatory letter in *The Greatest American, Alexander Hamilton*, by Vandenberg.

<sup>2</sup> *The Federalist*, No. 41.

this brief but all-inclusive epitaph: "The Republic Is His Monument."

We attempt no adequate biography. Obvious limitations forbid. But if the Recording Angel keeps books upon the lives of those who well serve both God and Human-kind, the major entries in the index to the Hamilton Apocalypse must sketch the revelation of a genius so complex, a precocity so rare, a courage so pure, a determination so bold, a fidelity so lofty, a motive so immaculate, a patriotism so selfless, and a service so transcendental, that detail is unnecessary to complete the picture of a superlative American whose spirit should bring welcome benediction whenever it may be invoked in this or any other time.

Born in the West Indies, January 11, 1757, of Scotch and French Huguenot extraction, he first set foot in the distraught Colonies, which he was destined to weld into imperishable Union, as a friendless immigrant upon the docks of Boston, fifteen years of age. The prophecy of revolution lay upon his adopted land. On July 6, 1774, a stripling in years and in physique, he pushed his unbidden way to the rostrum at the famous "Meeting In The Fields," called to make New York's liberty-zeals articulate, and, though great patriot orators were there, prepared for the occasion, his

maiden and extemporaneous philippic dominated the event; and, as the lightning leaped from his lips, men thrilled with holy joy that a torch-bearer to the new crusades had appeared to light the way. A boy of seventeen!

His were no cloistered philosophies which scorned to practice what they preached. Quickly he was in the crude martial ranks that were to best the proudest monarchy on earth. A private! Soon a Captain of artillery! Commanding the rear guard that covered Washington's retreat after the Battle of Long Island! Taking the brunt at White Plains! Across the ice-choked Delaware! Trenton! Then —the highest compliment the greatest of soldiers could pay to beardless youth—Aide and Military Secretary to the Commander-in-Chief, key-position on the staff of Washington! "The Little Lion," the Army affectionately called him. All through the thorny griefs and sufferings at Valley Forge! Monmouth Court House! Knox and Laurens, Lafayette and Steuben loved him with devoted affection. Washington leaned heavily upon his pen and sword. Yorktown! Hamilton led the first assault! The war for American independence was won. Freemen's hearts proved sturdier than imported steel. Now was the even greater task —to consolidate and perpetuate the victory.

Offered a Commissionership of the French Loan, discussed for the British Peace Embassy, he took his first public office in 1782, when Robert Morris appointed him Continental Receiver of Taxes for New York. With Morris, he already was discussing the fiscal structure which should liquidate the New World's debts. At twenty-five, a pivotal member of the Continental Congress, where one year of sham and powerless parliament convinced him that the hope of his country hung upon re-organization into Union. Futility rewarded his efforts to win a call for a Constitutional Convention from the body of this Congress. But he was the first man to voice this aspiration on American Congressional floors.

Three years hard labor in his profession in New York. At twenty-eight, the acknowledged leader of the New York Bar. The Annapolis Convention for the creation of inter-state commercial compacts. Hamilton present—at the head of New York's delegation—sensing the opportunity to launch the broader project that should generate a Nation. The call for the Philadelphia Convention, penned by Hamilton himself. Back to the New York Legislature, to force his State's representation therein—despite the bitter hostility of Governor Clinton, the most powerful politician of his day.

Then to Philadelphia, again spokesman for New York. "Hamilton was easily the most brilliant man in the company."<sup>1</sup> The long Convention struggle. Hamilton striving, sometimes for a conservative extreme in order to guarantee safety to the ultimate compromise, but always for effectual government that should be equal to the responsibilities of conserving ordered freedom. Deserted by his States-rights colleagues from New York, signing the completed Constitution. But for him and his flaming courage, New York would have been absent from that honor roll, and if New York had been absent, no prophet dare say what might have been the Constitution's and the Union's fate.

Back to New York again and into the thick of combat to win his home State's ratification. Never did intrepidity cope with more desperate odds. *The Federalist*—mightiest homily on Government ever issued from the pen of man. The Convention at Poughkeepsie. Hamilton at the head of a forlorn hope. Nineteen delegates, favorable to the Constitution, had been elected. Forty-six, foresworn to defeat the great experiment. The odds were worse than two to one. New York, mid-way—north and south—in colonial geography, was the real key to Union. Without her, not one Union

<sup>1</sup> Robert W. McLaughlin's *Washington and Lincoln*.

but probably three weak and quarrelsome Confederacies. Six weeks of guerilla debate which would have broken a genius less sturdily endowed with the power of personality and the authority of right. Always, Hamilton on guard. Herodotus had no more compelling text when he wrote Leonidas into everlasting history for his lonesome exploit at Thermopylæ, nor Lord Macaulay when he immortalized Horatius at the Bridge. At last, a majority of two in favor of the Constitution! It had been Armageddon for the new Republic. Fate never hung by slenderer thread. But the dazzling leadership of Hamilton had saved the epochal day. The destiny of the United States, upon the knees of a youth of thirty-one!

Organization of the new Government under the Presidency of the great and noble Washington. Hamilton called to the cabinet as first Secretary of the Treasury. His fecund genius behind the organization of every agency to administer the Constitution. He armed the Government with credit and with a productive revenue. Congress sought his guidance at every step. Report after report, as sapient as they were encyclopedic, went to the Legislature, in answer to its prayers for guidance. In flashing succession, he planned the revenue cutter service, recommended navigation laws,

drafted the first bill for a postal system, laid the foundation for the purchase and establishment of West Point, proposed the means for handling public lands, established the mint, advised the decimal system for our money, proposed the patent system, fore-cast the encouragement of manufactures through tariffs, engineered the politics which saved the repudiation of public debts and located the Capitol at Washington, planned the Bank of the United States. The Master Builder at the age of thirty-two! Fighting off the hounds of defamation who tried ambush when they failed in fair attack. Jealous of his honor. Equally zealous that organization under the Constitution should succeed.

Foreign involvements. War between France and England. Pursuant to Hamilton's advice, Washington's proclamation of Neutrality, setting a traditional American fashion which has lived to bless posterity, and likewise anticipating the "Monroe Doctrine." British impositions on our commerce. The Jay Treaty to end them amicably—first inspired and then defended by perpetual partnership between Washington and Hamilton. Meanwhile, inestimable service to the authority of the Constitution—first, by legalistic brief proposing, for the first time, its "implied powers"—

second, by crushing Western Pennsylvania's rebellion against Federal excise power. Wherever the danger, there the service. Always, meanwhile, his invincible pen in uncompromising battle with every domestic heresy and every imported menace. Never flinching, never recreant. When Hamilton resigned, President Washington wrote him: "In every relation which you have borne to me I have found that my confidence in your talents, exertions and integrity has been well placed."

President Adams, irascible, old patriot, resentful because Hamilton had not been his sled-length advocate, was forced ultimately to say: "Hamilton was all the time the Commander-in-Chief of the House of Representatives, of the Senate, of the Heads of Departments, of General Washington, and last, and least if you will it, of the President of the United States." Trouble with France. The X. Y. Z. papers. The country swept toward war. Washington recalled as Commander-in-Chief, consenting to the draft only on condition that his designation should be nominal, and that Hamilton should be in actual control. Tremendous preparations, with typical enthusiasm and thoroughness. Not a contingency left uncharted. Invasion of Louisiana and Florida contemplated, not only as martial strategy, but as an opportunity for essen-

tial National growth. Hamilton, the first American to think continentally. Death of Washington. Hamilton, a Lieutenant-General, in first command until his honorable discharge at the end of trouble. Bungling diplomacy in the White House. Ultimately, peace without a conflict.

The elections of 1800. Nullification's first ugly gesture toward the Constitution. Hamilton, as usual, at the front. Challenged by this seeping threat to the solidarity of Union. His party defeated by Jefferson and Burr. The first great political reaction. Equal Democratic electoral vote for Jefferson and Burr. Choice thus thrown into House of Representatives. Reckless in the anger of defeat, Federalists inclined to connive with the ambitious Burr to prevent Jefferson's election. Knowing the country's clear intent and expectation, Hamilton refused to sanction any such vendetta. Much as he distrusted Jefferson, he could not consent that an unscrupulous rascal should assume supreme authority over a Government to which he had dedicated his life.<sup>1</sup> It was due to him alone, and his sublimity of devotion to principle, that his greatest, outstanding rival succeeded

<sup>1</sup> Bryce correctly says in his *American Commonwealth*: "Hamilton's action—highly patriotic, for Jefferson was his bitter enemy—cost him his life at Burr's hands."

to The White House, and that Aaron Burr did not become the third, and perhaps the last, President of the United States.

Burr, bent on renewing his prestige, candidate for Governor of New York. Plotting broken Union. Planning Constitution subversion. Dreaming of a Northern Confederacy which he might dominate. Hamilton once more the defender of the faith. Bitter campaign. Burr defeated. Stirred to murderous revenge. Duel. Hamilton aimed in air—Burr, at the heart of the Master Architect of a Constitutional Republic. Death united all America at the funeral bier. The affections of a Nation, shocked by tragedy into sudden realization of its love and loss, joined hearts and tears in as noble and impressive and eloquent a requiem as ever canonized any martyr in the story of the world.

Such is the sketch—necessarily inadequate. But, between the lines, the blindest reader must find a record of surpassing portent. Libraries have been written to this text and left the subject unexhausted. There were many other profound figures on the early stage—but none more profound. There were times when Hamilton erred—he was intensely human—but never at the expense of Constitutionalism, Union and the Republic.

Surely, such an American is a worthy counselor in any age.

Who, of better right, bespeaks the spirit of the Constitution and the genius of our institutions, than the warrior who stood with Washington when independence was achieved; the prophet who cried out for organized Union at Annapolis and Philadelphia; the philosopher who largely influenced the drafting of the mighty Charter; the advocate who forged the argument upon which it made popular appeal; the crusader who bore triumphant lance against the enemies to ratification; the statesman who organized practically the entire machinery to serve its functions; the exponent who proved its possession of a power equal to every exigency; the loyalist who stood like the rock of ages against every effort to subvert its aims; the martyr who died a victim to his own faiths and his own achievements?

Who, better than the Builder whose "great plastic hand moulded the Confederacy into so compact, so beautiful, and so consistent a mass"<sup>1</sup> can know of the headstones in the corner, the rock whence we are hewn? Who, better than so great a Constitutional Apostle as this one whom Marshall did not hesitate to scrupulously follow, and Story

<sup>1</sup> *Life and Times of Alexander Hamilton*, by Samuel Schmucker.

to approve, and who was himself deemed eligible to the highest judicial ermine, can interpret what the Constitution means?<sup>1</sup>

If, as one prominent modern author has declared, Hamilton is the patriot "to whom we owe more than to any other single individual for the standard form of government, and to whom the world owes more than to anyone else for enlightenment in the field of political science"<sup>2</sup> it would be wanton dissipation to ignore so rich a source of inspiration and illumination in regard to the problems of to-day. Indeed, the importance of what Hamilton would say and do if he were here, becomes so signal that no student, however faithful in his purposes, could be forgiven any speculations outside the vigorous and prescient record left by Hamilton himself. Wherefore, the particular record we have chosen becomes of next and scarcely secondary consideration.

. . . . .

<sup>1</sup> Justice Marshall said of Hamilton's argument, originating the principle of liberal Constitutional construction and the doctrine of implied powers: "There was nothing in the whole field of argument which had not been brought forward." Justice Story pronounced Hamilton's effort "one of the most masterly disquisitions that ever proceeded from the mind of man."

<sup>2</sup> *Back to the Republic*, by Harry F. Atwood, 72.

*The Federalist* was the name given to a series of eighty-five epoch-marking articles appearing in New York publications during the months when the Constitution hung in the balances. "Together they form one of the great classics of government," Dr. Charles W. Eliot has declared, prefacing their notice in the *Harvard Classics*. In clarity of logic, force of appeal, projection of vision and wisdom of advice, they come down through the decades with a living message that only the meanest apostate will attempt to deny. Their influence at the time of publication cannot be overestimated. They were the torch that lighted the dark and sorely beset paths of that minority of New York's citizenship which, with Hamilton, believed in the new Republic. They were charts of reassurance to the new Constitution's friends; unanswerable indictments to its foes. They were as daring as they were sound. They were as imperishably true as they were influentially effective. Without them, certainly without their dominating author, New York would have rejected the Constitution. New York's rejection would have broken the Union ere it was launched. Nor was *The Federalist*'s immediate influence purely local. *The Federalist*, wrote Senator Henry Cabot Lodge in his admirable *Life of Hamilton*, "throughout the length and breadth

of the United States did more than anything else that was either written or spoken, to secure the adoption of the new scheme."

All of these essays were addressed "to the people of the State of New York." They appeared in *The Packet*, *The Daily Advertiser*, and in McLean's Edition of *The Independent Journal*, from the autumn of 1787 to the spring of 1788. All of them bore one simple signature—"Publius."

Thus far we have mentioned only Hamilton in connection with their authorship. This has been through no disposition to ignore his incidental collaborators, but rather to reflect the verdict of that age and of history as to the dominant responsibility. John Jay—Governor of New York, Ambassador to England, Chief Justice of the Supreme Court—wrote five of the eighty-five Papers. James Madison—subsequently President of the United States—wrote fourteen. Hamilton and Madison probably joined authorship in three. The source of twelve is claimed by some to be in doubt, though small doubt can linger with those thoroughly familiar with Hamilton's incandescent style. These latter, and fifty-one undisputedly his own, comprise far the major portion and the major motif. We do not deprecate Madison and Jay. Both served large functions in the evolution of the Nation.

Madison, in particular, was a host in himself when the Constitution was created. It but strengthens the compliment to Hamilton that such men as these should have been glad and willing to become Lieutenants under his sturdy Captaincy. Furthermore, regardless of casual contribution from two other famous men, the fact remains that Hamilton endorsed every word in every Paper, and, therefore, made the total Federalist the expression of his creeds and faiths.

It was the habit of those days for men to borrow sobriquets in writing for the press. As "Phocion," Hamilton challenged post-war demagogic which aimed indefensible excesses of vengeance against ex-Tories in New York. There never was music to his ears in the mistaken plaudits of a mob. "Phocion" pleaded for "justice, moderation, liberality and a scrupulous regard to the Constitution," banning "passion and prejudice" and the distractions due if "the Constitution is slighted or explained away upon every frivolous pretext." As "Pacificus," Hamilton defended American neutrality when hot-heads, fevered with French sympathies, were scoring Washington and welcoming Citizen Genet. As "Americanus" and "Horatius," he continued his appeals for what the modern lexicon would call "unhyphenated Americanism."

As "Camillus" he defended the Jay Treaty with England—a powerful message against "government by weak and vague words; against the policy of drift, which possesses neither the courage to foresee results nor the energy to prepare for them; against those people, arguing interminably to delay action, who grudge every sacrifice whether its object be peace or war, and who denounce with the same cantankerous hostility all preparations as aggressive and all concessions as cowardice." All these postscripts to *The Federalist* can be read in perfect harmony with the doctrines evolved when it was "Publius" who held the pen. They not only confirm the essential authorship of *The Federalist*, but they amplify and elucidate its theme. So, too, *The Continentalist*—six papers written in 1781—were an epitomized prologue, an advance miniature of *The Federalist*. "There is something noble and magnificent in the perspective of a great, Federal Republic, closely linked in the pursuit of a common interest, tranquil and prosperous at home, respectable abroad, but there is something proportionately diminutive and contemptible in the prospect of a number of petty states, with the appearance only of Union, jarring, jealous and perverse, without any determined direction, fluctuating and unhappy at home, weak and insignificant by their

dissentions in the eyes of other Nations. . . . Happy America if those to whom thou hast intrusted the guardianship of thy infancy, know how to provide for thy future repose, but miserable and undone if their negligence or ignorance permits the spirit of discord to erect her banners on the ruins of thy tranquillity."

Equally well and earnestly may it be repeated in this modern time. Happy America if the guardianship of the spirit of the Constitution may continue to rule destiny, but miserable and undone if negligence or ignorance of "the rock whence we are hewn" shall govern the uneasiness of to-day and the uncertainty of to-morrow.

*The Federalist* itself was chart and compass to the Constitution—was, and is. Draft of the first Paper was prepared in the cabin of a little vessel while Hamilton was gliding down the Hudson: but the last echo of the last Paper will not die so long as the American Constitution, of which it was the supreme interpretation, shall survive. "It holds the same high place in the literature of America that is occupied in that of Britain by the letters of Junius and the reflections of Burke on the French Revolution. . . . Shortly after its first appearance, it was translated into French by M. Buisson, and published in Paris. In that country, it has taken

its place by the side of Montesquieu's *Spirit of Laws*. It has been republished in Switzerland, and has been there honored as the worthy associate of the work of Burlamaqui on the same subject. It is known and appreciated in every country of Europe, just in proportion as the liberty of the press and liberty of speech are possessed and enjoyed."<sup>1</sup>

Should it not be equally known and appreciated in the land of its creation? One of the leading newspapers in the United States recently summed the case as follows:

"We cannot afford to let defense of the Constitution rest upon its results, benignant as they have been. We see to-day that our people consists largely of two classes—the Americans who take their legacy of ordered liberty for granted, who have paid nothing for its gifts and are only dimly conscious of what it means to American well-being, and a numerous class of newcomers who know nothing of American experience and its fruitage of political institutions and bring with them many theories and pre judgments which are inconsistent with our principles of progress. To awaken the former and instruct the latter is one of the chief duties of American statesmanship at this moment,

<sup>1</sup> *Life and Times of Alexander Hamilton*, by Samuel H. Schmucker.

and we must note that there are very few of our leaders who are showing any perception of this public need. On the contrary, for more than half a century, American thought has been infiltrated with economic, social, and political ideas imported from Europe. About the only polemics we have is that of radicalism, and we find our intellectual classes widely if not deeply infected with all shades of protest. Against this tendency we think it is high time there should be clear and vigorous resistance. Confirmed as we may be in allegiance to our American principles of ordered liberty and to the institutions which have given them such wonderful expression throughout our National history, we cannot afford to allow subversion to go unchallenged on the theory that they will defend themselves. Sophistry and plausible argument allying themselves with inevitable discontents can accomplish injuries which we were foolish not to avoid if we can. . . . This work lies to our hand, for leaders in public life, for the press, for the schools. The Nation needs a rededication to the doctrines and the institutions which have presided over its unprecedented progress and well-being."<sup>1</sup>

. . . . .

<sup>1</sup> The Chicago *Tribune*, October 21, 1922.

So we turn to our counselors—Hamilton and *The Federalist*; what the one would do and say if he were here to-day, gauged by what the other dictates from its oracle of history. Worthier counselors, with more profound credentials, could not be drafted for our admonition. Great as is our marvelous age, we have not graduated beyond all liability to eternal truths. This is “the rock whence we were hewn, and the hole of the pit whence we were digged.”

## The Courts—And Liberty

“The vigour of Government is essential to the security of liberty; in the contemplation of a sound and well-informed judgment, their interest can never be separated; a dangerous ambition more often lurks behind the specious mask of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of Government. History will teach us that the former has been found a much more certain road to the introduction of despotism than the latter, and that of those men who have over-turned the liberties of Republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.”—*The Federalist*, No. 1.

IF Alexander Hamilton were here to-day, it is no presumption to assert that the first of the many trends, away from the bases of the Constitution, to which he would interpose uncompromising objection, would be the recurrent impatience which seeks, in one way and another, to strike down the Courts of the United States as an independent branch of Government. Nothing could aim more directly at the heart of the carefully balanced theory, since validated by time and experience,

upon which the Republic was established, than these perennial efforts to subordinate the Federal Judiciary either to the political mandate of Congress or to the hasty impulse of the people. It is an easy theme for soap-box harangue—this notion that the Supreme Court, for example, is a barrier to popular self-determination. But candid analysis soon confesses that the barrier does not stand against the mature judgment of the people. Rather, it stands only against those forces, regardless of where or what they are, which would ravish the Constitution—the paramount possession of the people—without the consent of the people as formally expressed in the manner prescribed by Law. Without an independent Federal Judiciary, as established by the Founders of American Government, it can be simply proven that the Constitution becomes the merest “scrap of paper.” Without an independent Federal Judiciary, it can be easily demonstrated that Liberty ceases to have her “day in Court.” Without an independent Federal Judiciary, it is a palpable axiom that the fundaments of our ordered society—as prescribed more than a century ago, and as vindicated by thirteen progressive decades of experience—are broken. Yet, encroachments upon an independent Federal Judiciary continue to be vigorously proposed, and,

unfortunately, continue to win thoughtless approval among citizens who neglect to trace them to their lethal consequences. What at first sight may seem a remedy, is, in reality, a poison.<sup>1</sup>

If Hamilton were here to-day, there can be no doubt that he would turn the batteries of his invincible logic upon these proponents of Constitutional sabotage. All that he said and did to overcome the prejudices of his own time, applies with perfect pertinence to the prejudices and putative prostitutions of to-day. He would probably first acknowledge the good faith of most of those whom he would oppose, admitting—as he did in *The Federalist*<sup>2</sup>—that “an over-scrupulous jealousy of danger to the rights of the people, which is more commonly the fault of the head than of the heart,” may ofttimes be misconstrued as “mere pretense and artifice, the stale bait for popularity at the expense of the public good.” But then, with righteous wrath, he would defend the good faith of loyal Constitutionalists whose “enlightened zeal for the energy and efficiency of Government” is so constantly “stigmatized as the offspring of a

<sup>1</sup> This pertinent sentence was used in *The Federalist*, No. 22.

<sup>2</sup> No. I.

temper fond of despotic power and hostile to the principles of Liberty.” Certain it is that this man who battled so long and so heroically for the creation and the erection of Constitutional Government on the essential basis of three independent branches—Executive, Legislative and Judicial—and who gave his life to defend the solidarity of Union as thus controlled, would never compromise one jot or tittle with modern wrecking crews which would tear from their places any of the boulders which he helped to set in the foundations of the world’s first and greatest representative Republic. And, as he convinced his contemporaries of the truths he preached, he would convince his heirs to Liberty that they hazard their own most priceless endowment when they lean toward “experiments upon the public credulity, dictated either by a deliberate intention to deceive, or by the over-flowings of a zeal too intemperate to be ingenuous.”<sup>1</sup>

That we embark upon no mere academic discussion of abstract dangers is amply testified by more than a century of precedent, as detailed in a subsequent monitory chapter. But, that it is more than a mere historical contemplation, on the other hand, we are pertinently reminded by a modern movement—fathered by a vigorous, crusading

<sup>1</sup> *The Federalist*, No. 24.

Senator of the United States,<sup>1</sup> and sponsored by a powerful national alliance<sup>2</sup>—to eliminate the United States Supreme Court as the judge of the Constitutionality of Acts of Congress. There can be no such subversions, be they great or small, which do not threaten the character of our Republican Government<sup>3</sup>; and there can be no permanent assurance of repudiation for the subversions except as this Republican character is thoroughly understood and appreciated.<sup>4</sup>

At the base of the Republic, let it never be forgotten, is a written Constitution from which Government derives all of its authority. The creation of this written Constitution was the great American innovation. The Constitution is the constant, fundamental expression of American purpose, the fountain-head of power. It is, in effect, the master-record which speaks immutably

<sup>1</sup> Robert M. LaFollette of Wisconsin.

<sup>2</sup> The American Federation of Labor.

<sup>3</sup> The adjective "Republican" in all these observations is a derivative from the noun "Republic," and bears no abstract relationship to the name of a political party.

<sup>4</sup> *The Federalist*, No. 10, emphasized this point and gave it practical application in terms of contemporary politics when it said: "According to the degree of pleasure and pride we feel in being Republicans, ought to be our zeal in cherishing the spirit and supporting the character of Federalists."

for the people. The Constitution and the people are synonymous. The people alone can change the Constitution. The Constitution fixes limits to the prerogatives of the Executive and Legislative departments of Government, as they affect each other and the rights of the people and the states. Then it erects the Judiciary to enforce these limitations and these grants, and to protect these rights. Eliminate the Judiciary, serving this defense, and the Constitution becomes a mere homiletic code to be interpreted, according to changing inclination, by the very agents whom it is supposed to restrain. Eliminate the Judiciary—or impair its decisive authority—and as Gouverneur Morris of New York once said, “the sovereignty of America will no longer reside in the people, but in Congress,” or in the Executive, “and the Constitution is whatever they choose to make it.” Sovereignty cannot be in Congress and in the Constitution at one and the same time. A guaranty by the National authority must be “as much leveled against the usurpations of rulers as against the ferments and outrages of faction and sedition in the community.”<sup>1</sup> As between the Constitution and Congress, sovereignty cannot desert the former without deserting the people. Therefore, the elimination or the re-

<sup>1</sup> *The Federalist*, No. 21.

pression of the Judiciary, would be a blow unwittingly aimed by the people at themselves.

"If the interpretation of a written Constitution is not committed to Judges, what use is it? If the majority can do whatever they chose to declare Constitutional, what better is it than the revocable charters which absolute monarchs in Europe amused themselves by granting, for some years after 1815?"<sup>1</sup>

Washington's Farewell Address pleaded the need for these Constitutional stabilities lest "the alternate triumphs of different parties, make the public administration the mirror of ill-conceived and incongruous projects of faction, rather than the organ of consistent and wholesome plans, digested by common councils, and modified by mutual interests." *The Federalist*<sup>2</sup> pronounced the truth: "The accumulation of all powers, Legislative, Executive and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny." It cannot be said too bluntly or too often that subversion, no matter what its pretext or guise, of the

<sup>1</sup> This question was thus asked by *The Nation*, fifty years ago, in an issue of February 17, 1870.

<sup>2</sup> No. 47.

Federal Judiciary, is subversion of the Constitution, and, therefore, in the final analysis, an attack upon the real common welfare of the people themselves. Yet every such enterprise presents itself in the name of "popular rights"—when, in fact and result, it is addressed to a nullification of popular rights and liberties. Let it be always remembered that "Liberty may be endangered by the abuses of liberty as well as by the abuses of power."<sup>1</sup>

It is unfortunate that the Judiciary is the easiest branch of the Government to attack; but it is inevitable because, by the nature of its cloistered works, the people are not in close and constant contact with it.<sup>2</sup> This is an instance where distance does not lend enchantment. But it is no less important because rarely in personal contact with the citizen, than is the magnetic pole, because not in immediate proximity to every compass. The same

<sup>1</sup> *The Federalist*, No. 63.

<sup>2</sup> *The Federalist*, No. 27, correctly pointed out that "the more the operations of the national authority are intermingled in the ordinary exercise of Government, the more the citizens are accustomed to meet with it in the common occurrences of their political life, the more it is familiarized to their sight and to their feelings, the further it enters into those objects which touch the most sensible chords and put in motion the most active springs of the human heart, the greater will be the probability that it will conciliate the respect and the attachment of the community."

relative utility is served by both, regardless of the distance through which they indispensably function. The Judiciary's susceptibility to attack makes it the greater charge upon the loyalty of the citizen who would sustain the Republic. These outposts of the Constitution, like the outposts of an army, are as constantly essential as they are constantly the points of greatest danger. To ignore the outposts is to neglect mass-safety. Because the Judiciary is usually the buffer which must feel the brunt of passion when it becomes necessary for some branch of Government to defend the Constitution against encroachment, it is too frequently estimated by thoughtless citizens as the mere agent of restraints that are irksome and reactionary. But he is a superficial student of Constitutional freedom who does not agree with the great principle announced by Edmund Burke: "The restraints on men, as well as their liberties, are to be reckoned among their rights; . . . society cannot exist unless a controlling power over appetite and will be placed somewhere; it is ordered in the eternal constitution of things that men of intemperate minds cannot be free; their passions forge their fetters." James Russell Lowell proved that the Judiciary and the Constitution are inseparable—"Our written constitutions are an obstacle to the

whim, but not to the will of the people"—because the "Constitution" is an "obstacle" to nothing except as it possesses a Judiciary to render its authority articulate and vital. Secretary of State Charles E. Hughes, upon the occasion of his farewell to Brazil at the end of his pilgrimage to the Brazilian Centennial Exposition<sup>1</sup> declared: "The institutions of liberty rest for their final security in the self-restraint of those who love liberty too much to destroy its essential foundations." Nobly spoken—as Hamilton would speak if he were here to-day! *The Federalist*<sup>2</sup> itself had this to say:

"Though the Courts may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the Courts; AS NO MAN CAN BE SURE THAT HE MAY NOT BE TO-MORROW THE VICTIM OF A SPIRIT OF INJUSTICE, BY WHICH HE MAY BE A GAINER TODAY. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and

<sup>1</sup> September, 1922.

<sup>2</sup> No. 78.

to introduce in its stead universal distrust and distress."

Of course, it is not always those of "sinister expectations" whom the Judiciary disappoints. On the contrary, the Supreme Court of the United States is not infrequently required to accept the mandate of the Constitution and rule against obviously useful projects because the statutes behind these projects clash with the Constitutional division of powers as between States and the Federal Government. Thus, there were no "sinister expectations" in the hearts of those who were disappointed when the Court found that Congress had no Constitutional authority to proscribe child-labor. But there are distinctly sinister purposes in these same hearts if, in such circumstance, instead of moving for a Constitutional Amendment to cure the defect in the Charter itself, they leap to the hasty and indefensible expedient of attempting to penalize the Court for interpreting the Charter as it is rather than as it ought to be. The Court has but one duty—to mirror the Constitution as it is, to the best of fallible human ability. If the Constitution fails an essential purpose, as it did in the instance of child-labor, it is for the people—the people only, not the Courts or Congress—to change the Constitution, as they most certainly should and

most certainly will in this instance. "Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively as well as individually; and no presumption or even knowledge, of their sentiments, can warrant their representatives in a departure from it, prior to such an act."<sup>1</sup> There can be no other American doctrine, except as we bid the Constitution adieu—and if, in the name of a treacherous "progressivism," we are to embark upon that sort of nullification, at least let it be with eyes that are open and ears that are not deaf to the admonitions of reason and experience. "The basis of our political systems," declared Washington in his Farewell Address, "is the right of the people to make and to alter their Constitutions of Government; but the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all; the very idea of the power and the right of the people to establish Government presupposes the duty of every individual to obey the established Government." "If the zealot, impatient of the wise caution and delay enjoined by the Constitution, would break down its barriers to hasty action," said Henry D.

<sup>1</sup> *The Federalist*, No. 78.

Estabrook,"<sup>1</sup> "he should be compelled, if only as a penance, to study the Constitution and to know all the circumstances out of which it grew, the quality of the men who fashioned it, as well as the quality of the work accomplished by them."

It should be clearly understood, in these connections, that nobody is so parochial as to pretend that the Constitution is infallible, and that, in its original promulgation, it was immune to improvement as changing conditions might develop changing needs. On the contrary, the Fathers themselves recognized their own limitations; and nothing could more convincingly testify to their prescience than their provision, within the Constitution itself, of ample machinery for Constitutional amendment and for the expansion of Constitutional powers. Indeed, *The Federalist*<sup>2</sup> boasted that reasonable elasticity was one of the Constitution's virtues: "We must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil Government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to

<sup>1</sup> Address in Kansas City, Missouri, September 26, 1913, before Missouri Bar Association.

<sup>2</sup> No. 34.

the natural and tried courses of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power, proper to be lodged in the National Government, from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, it is impossible safely to limit that capacity." The Fathers, in other words, did not deny the growth of Constitutional wisdom nor did they fore-close its processes in years to come. Paternal respect, as well as elementary common sense, recommend that we be no less humble in the search for truth—and that we neither deny the sources of Constitutional wisdom nor neglect its controlling currents.

The Constitution already has been amended nineteen times.<sup>1</sup> It will be amended again whenever the mature judgment of the people concludes that changes will spell permanent advantage. The Constitutional Loyalist is not required to set his face like flint against all consideration of all Amend-

<sup>1</sup> The first ten Amendments constitute the "Bill of Rights" and were ratified immediately after the Constitution became effective; the eleventh, in 1798; the twelfth, in 1804; the next three, following the Civil War; the last four, since 1913.

ments. That posture would be reactionary and purblind. The danger is in other directions: either from an impatient effort to evade the Constitution without amending it, and to subvert it without authority, or from a lethal attempt to amend it in those fundamentals which involve the genius of the entire Constitutional plan. One does not need to embrace these latter revolutionary purposes in order to be "progressive"; indeed, to embrace them is to be destructive of the sources of all "progress" in an ordered Republic.

Usually, as we have said, these subversions select the Judiciary as the easiest target. Indeed, since it is the Judiciary which finally stands alone as the last and constant barrier to Constitutional subversion, it is not illogical that all those who seek easier access to licenses which the Constitution interdicts, sooner or later should concentrate attack upon the power which inevitably opposes and ultimately defeats these perverse aspirations. Thus, it is not illogical—from the view-point of those who harbor such ambitions—that the life tenure of Federal Judges should be exchanged for a system of periodical elections, so that the Courts may be held accountable to the uncertainties of popular fancy and the penalties of frenzy, instead of to the unswerving mandates of the Constitution.

But it would be decidedly illogical for the body politic to join in these subtractions from the impregnability of a Judiciary which, in the final analysis, must measure its service to the Constitution, and, therefore, to the people, in proportion to its independence of ulterior influences.

“If the Courts of justice are to be considered as the bulwarks of a limited Constitution,” said *The Federalist*,<sup>1</sup> “this consideration will afford a strong argument for the permanent tenure of Judicial offices, since nothing will contribute so much as this to that independent spirit in the Judges which must be essential to the faithful performance of so arduous a duty. . . . This independence of the Judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill-humours which the arts of designing men or the influences of particular conjunctures sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the mean time, to occasion dangerous innovations in the Government, and serious oppressions of the minor party in the community.”

If the Federal Judiciary were brought within

<sup>1</sup> No. 78.

direct reach of electoral dismissal—let it not be overlooked that the Constitution provides the means of their dismissal for cause—the interpretation of the Constitution would become a matter of biennial referendum, and the character of the Constitution—always reflected by the Courts—would accommodate itself to the mutable breezes of shifting political dominion. In other words, the Constitution would cease to be the Rock of the Covenant. It would become a weather-vane, responsive to the capricious winds and the fickle hurricanes of politics.

That this disaster has always been escaped under the still existing independence of the Bench, is testified by the eloquent fact that Justices named by Jefferson did not hesitate to sustain Nationalistic policies obnoxious to him, that Justices appointed by Jackson ruled against him in some of his most cherished purposes, that Lincoln, upon occasion, was vetoed by his own Judicial appointees—examples that could be infinitely multiplied. Truth is that the independence of the Court has been and must continue to be second only to the independence of the Constitution itself. The American people could make no greater mistake than to anticipate the strengthening of Liberty and Justice by weakening their citadels. Somewhere in every

system that attains permanence and serves constancy, there must be an immotile standard which suffers no vicissitudes. The same three feet must always make the same yard, regardless of the transient advantage which someone might attain by shortening it to two, or lengthening it to four. Similarly the standard of the Constitution must be indefeasible, and its administration must be consecutive in policy and interpretation. Otherwise, the Ship of State drifts upon the rising and the falling tides, responsive to both, faithful to neither. It neglects its chart and throws away its compass. Hamilton, if he were here to-day, would no more compromise with those who challenge this philosophy than he would, or did, compromise with Aaron Burr.

Somewhere, let it be repeated even at the danger of becoming tiresome, the voice of the Constitution, in the American system, must speak with constancy; and where, if not through this Federal Judiciary—"independent of party, independent of power, and independent of popularity"?<sup>1</sup> Justice Field, resigning in 1897, said: "Senators represent

<sup>1</sup> This phrase comprises a toast given at a dinner in Washington in 1801; it "has expressed the aim, and substantially the achievement of the Court, in the 120 years that have since elapsed." *The Supreme Court in U. S. History*, by Charles Warren, i, 21.

their States, Representatives their constituents; but this Court stands for the whole country." "It would be as rational to talk of a solar system without a sun as a Constitution without an independent Judiciary," observed William Wirt in 1832. Nor has the "astronomy" of political science changed one whit with the intervening years. If we forget the law of gravity, it is still the law of gravity despite our lapse.

"Justice is the end of Government," said *The Federalist*.<sup>1</sup> "It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secure against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a Government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful."

<sup>1</sup> No. 51.

Among other transient irritants which periodically set off a bombardment of the Federal Courts, and a corollary barrage laid down upon the Constitution, is the issuance of writs of injunction, particularly in Labor disputes. But why should this sort of responsibility, which belongs solely upon statute Law, thus be amplified against the Courts and the Constitution? The use of the injunctive process—particularly, temporary injunctions issued in Labor disputes—is a moot subject. Theodore Roosevelt, while President, did not hesitate to condemn certain elements of injustice which have seeped into this situation, though he solemnly declared: "Even if it were possible, I should consider it most unwise to abolish the use of the process of injunction."<sup>1</sup> William Howard

<sup>1</sup> Message to Congress, January 31, 1908: "The process of injunction is necessary in order that the courts may maintain their own dignity and in order that they may in effective manner check disorder and violence. The Judge who uses it cautiously and conservatively, but who, when the need arises, uses it fearlessly, confers the greatest service upon our people, and his preeminent usefulness as a public servant should be heartily recognized. But there is no question in my mind that it has sometimes been used heedlessly and unjustly, and that some of the injunctions issued inflict grave and occasionally irreparable wrong upon those enjoined. It is all wrong to use the injunction to prevent the entirely proper and legitimate actions of Labor organizations in their struggle for industrial betterment, or under

Taft, while President, did not hesitate to admit that the issue of a temporary restraining order without notice has been abused by its inconsiderate exercise, but he flatly declared: "Take away from the Courts, if it could be taken away, the power to issue injunctions in labor disputes, and it would create a privileged class among the laborers and save the lawless among their number from a most needful remedy available to all men."<sup>1</sup> There has been the utmost frankness always in the discussion of this subject. The Law has been changed from time to time. Perhaps it will be changed again—though it should be observed that Labor invites a precedent of utmost menace to its own rights and advantages whenever it seeks any element of "class favoritism" as a principle of American political economy. It is an inalienable American privilege to discuss these statute policies. Labor would be stagnant if it did not look jealously upon all these subjects. But all this is beside the

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the guise of protecting property rights, unwarrantably to invade the fundamental rights of the individual."

<sup>1</sup> Message to Congress, March 4, 1909: "The American people, if I understand them, insist that the authority of the Courts shall be sustained, and are opposed to any change in the procedure by which the powers of a Court may be weakened and the fearless and effective administration of justice be interfered with."

point. The point is: why drift, easily and thoughtlessly, from complaint against a repressive statute, to complaint against Judges who would be criminally derelict if they ignored statutes until changed by due process of Law, and then against Courts which would defile basic Americanism if they deserted these due processes of Law, and finally—in a climax of illogical desperation—against the Constitution itself? The paramount function of Courts and Constitution is to provide an independent, untrammelled sanctuary against invasions of individual and collective rights. If the sanctuary be razed, what possible form of protection can take its place? The Courts will listen as readily to the citizen whom an injunction offends as to the citizen, or group of citizens, who ask that it shall issue. But if this common fountain-head of justice be broken because it functions for the latter citizen, how can it remain to protect the former?

Whenever Labor disputes get into Court, or when Labor deems itself aggrieved by any invasion of its rights, it is among the first and the loudest—as it should be, as it has a right to be, as it is intended that it shall be—to cry out against the UN-CONSTITUTIONALITY of the offense against it.<sup>1</sup>

<sup>1</sup> For instance, September 11, 1922, at Atlantic City, President Samuel Gompers of the American Federation of

In other words, it leans upon the Constitution and acknowledges not only the righteousness of the Constitution's purposes, in relation to the rights of man, but also the Constitution's saving power to defend these rights. Should it not, then, be as zealous in defense of the Constitution and the due process of Law, as it is in claiming protection for itself under them? Must not the fortification be preserved if it is to be of any saving utility? What possible justification, in logic or self-defense, can there be for a proclamation on Labor's behalf, when a questioned injunction issues, to the effect that "the injunction invades our Constitutional rights and **SHOULD BE TREATED AS A SCRAP OF PAPER**"?<sup>1</sup> To treat the order of a Federal Court as a "scrap of paper," is to defy the Court which is the agent of the Constitution, and, therefore, to defy the Constitution itself. Such a doctrine, carried to its ultimate consequence, would wreck the Constitution. Is it not a gross

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Labor branded the Daugherty injunction in the railroad strike as "an invasion of the Constitutional guaranty of the founders of the Republic." In the same case, the same day at Chicago, Attorney D. R. Richberg, representing the strikers, argued that the injunctive process "deprived the defendants of their Constitutional safeguards."

<sup>1</sup> Newspaper quotations, September 2, 1922, of Mr. Gompers' comments on the Chicago injunction.

and pathetic anomaly to plead for "Constitutional rights," and then to recommend the destruction of the Charter under which the rights exist? "Men still have some Constitutional rights in America, and we shall stand on them," declared another leader in this particular controversy.<sup>1</sup> A fair, square challenge—thoroughly American, thoroughly Constitutional! But! Surely, it is an axiom that the source of these rights, the Constitution, and the agencies through which the rights must find protection, the Courts, must be of paramount concern to those who expect to enlist these entrenchments in the defense of their rights! We are moving, in America, into a new era of greater regard for the equitable industrial recognition of Labor. This trend cannot be too pronounced. It is overdue. But if the concomitant of this new advantage should be an invasion of the basic theories of American Government, in the mistaken notion that a breach in the walls of the Constitution can be of the slightest permanent utility to any citizen or any class, the era's debits will far outweigh its credits for all of us, Labor itself most emphatically included.

<sup>1</sup> Statement by W. H. Johnson, President of the International Association of Machinists, published September 2, 1922.

It ought to be unnecessary to multiply exhibits to support this particular section of our study. Let one more suffice. How inconsistent is the attitude of the radical propagandist who, in one breath, purposes the destruction of the American form of Government, and, in the next breath, appeals to the Government and the Constitution for protection of his "rights" when someone tries to rob him of his privilege of "free speech"! A mass meeting in Madison Square Garden, New York City, on May 31, 1917,<sup>1</sup> demanded "that the Government shall not suspend the liberties of the people as guaranteed to them by the Constitution,"<sup>2</sup> and contemporaneously resolved to deny all support to those war measures through which the preservation of the Government and the Constitution were possible! They demanded defense and voiced defiance, in the same apostrophe. They sought the sanctuary and deserted it, in one single movement. How, pray, could the Constitution and the Government, unsupported by their subjects, provide their subjects with the protection which depended upon the reciprocal support which their subjects withdrew? So, too, with the radical

<sup>1</sup> Under the auspices of the so-called Conference for Democracy and Terms of Peace.

<sup>2</sup> *New York Call*, June 1, 1917.

wing of the Socialist Party during the war. The "St. Louis Platform" of the Socialist Party,<sup>1</sup> adopted in May, 1917, pledged itself to "internationalism" as opposed to "the false doctrine of national patriotism," promised "continuous, active and public opposition to the war through all the means within our power," and committed itself to "unyielding opposition to all proposed legislation for military or industrial conscription," etc. In a word, it sought the martial defeat of America-at-war, and the crushing of Constitutionalism beneath the innovations of an imported communism. It treacherously struck at the critical moment of greatest travail, and ceaselessly persisted in hideous sedition which—thank God!—had no effect other than to galvanize the implacable fidelity of an overwhelming American majority into grim determination that Columbia should not be shot in the back.<sup>2</sup> Yet—strange mockery!—many of

<sup>1</sup> Proclamation and War Program; No. 5 of the Series of Organization Leaflets issued monthly by the National office of the Socialist Party, headquarters, No. 803 W. Madison Street, Chicago.

<sup>2</sup> In justice to thousands of loyal Socialists who bore their full share of war burdens, it should be said that this renegade wing of the party was repudiated no more vigorously anywhere than among these same loyal Socialists themselves—men who proved that Socialistic faiths do not need to be automatically antagonistic to American fundamentals.

these same incendiaries rushed to embrace the Constitution and to plead its guaranty of their individual rights, the first moment they were challenged for trying to destroy the very Thing upon which they ultimately relied for relief and protection. *The Federalist*<sup>1</sup> indicated "how unequal parchment provisions are to struggle with public necessity." The Constitution becomes something more than "parchment" only when it is vitalized by the uncompromising fidelity of those whose liberties it charts. How tragically insane, then, is the view of those fanatics who refuse to be faithful, yet expect the "parchment" to serve them in their dire emergencies! How incongruous to seek "safety from the very sources which they represent as fraught with danger and perdition."<sup>2</sup>

Some Americans have a passion for inconsistency. For the sake of posterity, it is to be hoped their moods shall never become commandingly contagious. The controlling necessity, in America, for a fundamental Constitution and Government, immune to flux, is no better argued than by a contemplation of these inconsistencies, and a moment's speculation as to what sort of a whirligig the Nation would become if committed to the unstable whims of such dissonant minds.

<sup>1</sup> No. 24.

<sup>2</sup> *The Federalist*, No. 29.

The stability of American Government and the Constitution and the Federal Judiciary can never be disassociated, one from the other. A chain is no stronger than its weakest link. Since the Judiciary is "the weakest link," in point of popularity, though the strongest in point of utility, its constant support is a mandate of necessity. "It is an exact perversion of fact, a misrepresentation of the whole historical situation, to assert that a few men or a cunning minority, when the Federal Judiciary system was established, were hunting about for obstacles to put in the way of a hungry populace. . . . . If one knows anything at all of the thought and activity of past ages; of how men fought against tyrannical, arbitrary Government and sought to put restraint upon it in order that they might be free or have a larger share of liberty; if he knows how philosophers have written of fundamental Law and the necessity of recognizing its full effect in the State; if he knows, in short, anything of the development of individual liberty, he will see in this power of the Courts not a conspiracy against democracy but the culmination of a long struggle for liberty against arbitrary government."<sup>1</sup> "The necessity of reciprocal checks in the

<sup>1</sup> *Steps in American Democracy*, by Andrew C. McLaughlin, 77.

exercise of political power, by dividing and distributing it into different depositaries, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes," said Washington in his Farewell Address.

The philosophy of the citizen who would emasculate the Supreme Court and the Federal Judiciary and destroy their Constitutional power, solely because he dislikes some verdict of some Federal Court against which he happens to be in contemporary conflict, is the philosophy of the Dutch farmer who would burn his barn to kill the rats in it. If there was propriety in the appellation of "Barnburners" in New York State, for a faction of the Democratic party in 1847 which helped defeat a party ticket which it could not control, it is distinctly congruous—and incisively pertinent—to use "Barnburners" as a suggestive brand for any school of politics which would seek "greater liberty" in America by gutting the Supreme Court's paramount Constitutional authority without which all Constitutional guaranty would disappear. If Hamilton were here to-day, the "Barnburners" would be the first to feel his outraged wrath.

## The Supreme Court in History

“Experience is the oracle of truth; and where its responses are unequivocal, they ought to be conclusive and sacred.”  
—*The Federalist*, No. 20.

“Let us consult experience, the guide that ought always to be followed whenever it can be found.”—*The Federalist*, No. 52.

FROM the hour<sup>1</sup> in the Constitutional Convention of 1787 when Luther Martin of Maryland moved the resolution which ultimately became the second clause in Article Six of the completed document and established the supremacy of the Constitution as the Nation’s paramount authority, a zeal for liberty more ardent than enlightened<sup>2</sup> has gnawed ceaselessly at the vitals of this dominant Charter: and from that subsequent prophetic moment,<sup>3</sup> when President Washington signed the Law creating a Federal Judiciary to make Constitutional authority articulate, the power of the Supreme Court of the United States has been as

<sup>1</sup> July 17, 1787.

<sup>2</sup> This phrase is used in *The Federalist*, No. 26.

<sup>3</sup> September 24, 1789.

perplexed a subject of political and factional debate as it has been an indispensable sheet-anchor to the American Ship of State.

These pages will not presume the dignity of a legalistic brief in sketching the history of these frictions and these essentialities. But an epitome of yesterday is necessary to judgment for to-day; and just as *The Federalist* constantly sought to illuminate the problems of that century with the beacon lights of historical experience, so our modern understanding needs the advantage of running familiarity with the major episodes in the evolution of the body of Constitutional Law as it now exists.

Efforts in 1922 to curb the Supreme Court of the United States and bring the Constitution within reach of the wolves of faction and the panthers of nullification are but old heresies in new mask. They are the same inflammatory declamations and unmeaning cavils.<sup>1</sup> The actors change, but the play is familiar. It has always been true that the Constitution without the Federal Judiciary would be "as much a mockery as a scabbard put into the hands of a soldier without a sword in it."<sup>2</sup> Yet the history of the United States is chaptered with strivings toward this mockery, and we live amid

<sup>1</sup> *The Federalist*, No. 23, created this phrase.

<sup>2</sup> Madison used this simile in 1832.

their latest renaissance in the present uncertain epoch. But as an intelligent citizenship has never in the past yielded to these persuasions,<sup>1</sup> it is to be hoped and expected that a knowledge of these historical decisions in other crises will recommend a kindred constancy to us for whom the trail is blazed.

There has been a variety of reasons used, in different decades, to justify attacks upon the supreme Constitutional authority of the Federal Judiciary. Expediency rather than consistency usually has been consulted. But always the assault has been asserted as a "life and death" affair; and so frequently has hostility been supported temporarily by extremist measures which ultimately have withered, that there is ample occasion for modern confidence that no crises lie ahead which will be more fatal than crises which futilely have threatened in the past.

The Constitution was but a few years old ere political faction, angered by Constitutional checkmate as pronounced by the Supreme Court, commenced this long line of offensives upon the agency of its restraint. Americans proverbially are impatient of barriers, even when they demarcate safety zones. Our characteristics in this respect are con-

<sup>1</sup> *The Federalist*, No. 22, would call them "syllogistic subtleties."

stant with the years. Thus, in 1793, Georgia flew into an ominous rage when the Court decided for the first time that a State is amenable to the jurisdiction of the Supreme Court.<sup>1</sup> Georgia's House of Representatives passed a Bill<sup>2</sup> providing that any Federal Marshal or other person who executed any process issued by the Court in the case involved should be declared "guilty of felony and shall suffer death, without benefit of clergy, by being hanged." This form of rebellion, however, did not persist; instead the Eleventh Amendment to the Constitution ultimately corrected the situation by lawful procedure. But the history of Court and Constitution was prophetically launched upon a turbulent career.

When the Anti-Federalists, then known as Republicans, came into possession of Legislative and Executive dominion under Thomas Jefferson on March 4, 1801, their avid appetites were restrained in numerous questionable directions by Supreme Court decisions—restraints which they wrongfully imputed to "politics" because all the Judges upon the Bench, appointed by Washington and Adams, were Federalists.<sup>3</sup> Setting a style which nearly a

<sup>1</sup> *Chisholm v. Georgia*, 2 Dallas, 419.

<sup>2</sup> November 21, 1793.

<sup>3</sup> The Federalist Party, organized under Hamilton, took

century and a quarter has not outlived, they resorted to "politics" for their reply. Hostile legislation, inspired by Jefferson, repealed the Circuit Act of 1801, by way of reprisal; and then, to postpone the submission of the Constitutionality of this repeal Act to the Supreme Court until the political power of Jefferson's administration could be strengthened, another Legislative subversion gerrymandered the Court calendar so as to enforce a Court adjournment for fourteen months. Hamilton viewed this assault and precedent as "a vital blow to the Constitution." It resulted in his suggestion for a Washington convention of Federalists to form "The Christian Constitutional Society" whose objects should be the defense of the Christian religion and the support of the Constitution. It also resulted in whetting Jeffersonian appetites for continuing anti-Court conquests. By 1803, impeachments of Justices were openly insinuated. James Monroe even proposed the repeal of the basic Law under which the Supreme Court was organized.

In the midst of this guerilla warfare, the Court, now guided by the genius of John Marshall, pursued the even tenor of its way—without having

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its self-explanatory name, as did the Federalist Papers themselves, from the theory of "Federalism" which Hamilton believed the Constitution embraced.

been awed by power, or influenced by any passions except love for its country<sup>1</sup>—and soon confounded its political critics by decisions which demonstrated how free it was of the ulterior motives that inspired those who plotted its curb. These decisions, in physical results, were favorable to the purposes of Jefferson and his party. By sustaining the Constitutionality of the vindictive Circuit Court Repeal Act, which was declared to be within legitimate legislative province, it put the Constitution above politics, and there it has remained to this day.<sup>2</sup> It also emphasized the monitory wisdom of *The Federalist*,<sup>3</sup> well worthy of modern recollection, that “the tendency of republican governments is to an aggrandizement of the Legislative at the expense of the other departments.”

But the Court’s most important decision, incidental to this vendetta between Federalists and Republicans, was in the famous case of *Marbury v. Madison*, establishing, once and for all, the power of the Court to adjudicate the validity of an Act of Congress—the fundamental decision in the American system of Constitutional Law,<sup>4</sup> which for over

<sup>1</sup> *The Federalist*, No. 2, applied this phrase to the original Constitutional Convention.

<sup>2</sup> *Stuart v. Laird*, 1 Cranch, 299.

<sup>3</sup> No. 49.

<sup>4</sup> *The Supreme Court in United States History*, by Charles Warren, i, 232.

one hundred years has never seen successful controversion. This supremacy of the written Constitution over statute Law, and the authority of the Federal Judiciary to act as arbiter in case of conflict between the two is "wholly and exclusively American; it is America's original contribution to the science of Law."<sup>1</sup> It was fore-casted by *The Federalist*<sup>2</sup> which could not have expressed the doctrine more plainly than when it said: "Whenever a particular statute contravenes the Constitution, it will be the duty of the Judiciary tribunals to adhere to the latter and disregard the former." Yet, thousands of advocates have urged to the contrary, and thousands of orators have pretended otherwise until the novel refinements of an erroneous theory<sup>3</sup> have borne perennial fruit even in our most recent day.

The Administration's hostility to the Supreme Court swept on without abatement. Marshall and Jefferson were no less antipodal than Hamilton and Jefferson.<sup>4</sup> Jefferson and his followers were intent

<sup>1</sup> *Life of Marshall*, by Albert J. Beveridge, iii, 142.

<sup>2</sup> No. 78.

<sup>3</sup> A phrase applied by *The Federalist*, No. 9.

<sup>4</sup> Jefferson wrote Monroe in 1800: "Nothing should be spared to eradicate the spirit of Marshallism." Marshall wrote Hamilton in 1801: "To Mr. Jefferson I have felt almost insuperable objections; he will sap the fundamental

upon humbling the Court and bending it to their political dominion. History differs as to motives; it cannot differ as to facts. The next result was the perfectly legal weapon of impeachment, aimed at Justice Chase, although an incompatible purpose—viz. to use impeachment as a “recall of judges” to bring the Bench into political sympathy with the Administration—inspired the trial. Justice Chase had been particularly frank—probably improperly so, in view of his position—in his plain-spoken criticisms of the Jefferson trend, and he was marked as first victim in the new offensive. “Now we have caught the whale, let us have an eye to the shoal,” said Jefferson,<sup>1</sup> who, according to William Plummer, Senator from New Hampshire, wanted “more pliant minds and accommodating opinions” in the Judiciary. But the “whale” escaped. The case against him was so palpably political that the Senate’s impeachment Court refused to convict him.

The Jacobins had to take another tack, this time a proposal to amend the Constitution, permitting the removal of all Federal Judges by the President

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principles of the Government.” Marshall wrote Story in 1821: “Every check on the wild impulse of the moment is a check of his own power, and Jefferson is unfriendly to the source from which it flows.”

<sup>1</sup> *Baltimore Federal Gazette*, March 9, 1805.

“on joint address of both Houses of Congress requesting the same.” This failed on its first, and four subsequent attempts, between 1808 and 1816. The Jeffersonian incentive to it, however, was accentuated in the cases growing out of Aaron Burr’s abortive adventures in south-western empire-building. Chief Justice Marshall ruled against Burr’s liability for treason, as a Constitutional proposition. Jefferson and his partisans ascribed this verdict to Marshall’s personal and partisan feeling.<sup>1</sup> But the historical truth would seem to be that Marshall had even greater cause for personal hatred of Burr because of his intrigues against Constitutionalism and his murder of Hamilton, than did Jefferson. The corollary truth, therefore, is that this episode—far from weakening judicative integrity—once more reflected the triumph of reason and Law over popular passion and personal prejudice.<sup>2</sup>

<sup>1</sup> Warren in his *Supreme Court in U. S. History*, i, 315, says there was “considerable justification” for this view; and Professor Andrew C. McLaughlin in the *American Bar Association Journal*, 1921, vii, 233, concedes the possibility that “the case is a blemish on Marshall’s career.”

<sup>2</sup> “It was his [Jefferson’s] weakness to think it safe for the friends of the People to make a ‘blank paper’ of the Constitution, but the very gate of revolution for those who were not Democrats.”—*A History of the American People*, by Woodrow Wilson, iii, 183.

Nothing can be said in defense of Jefferson's later action in causing his Attorney-General to circulate a proclamation denying the propriety of the judgment of a Federal Court in a matter to which the President was partisan.<sup>1</sup> Justice William Johnson, himself a Jeffersonian appointee, thus described this untoward act: "If you are prepared, gentlemen, to waive the Government of the Laws and submit without repining to every error and encroachment of the several Departments of Government, avow it to your fellow citizens, and prevail on them to abolish the Constitution, or get into office a feeble and submissive judiciary." It is the Republic's fortune that there always have been sturdy leaders thus to stand against subtle Constitutional assaults which seek, by indirection, to accomplish a measure of destruction which the Constitution itself can never license. Nor have we outgrown the need for sustained defenses in this direction. It is with us even now. *The Federalist*<sup>2</sup> foresaw the danger of a speak-easy radicalism which would find little difficulty to "inflame the passions of the unthinking and confirm the prejudices of the misthinking"; but it equally foresaw that ascendancy for this school of thought would spell the

<sup>1</sup> *Ex parte Gilchrist*, 5 Hughes, 1.

<sup>2</sup> No. 41.

beginning of the Constitution's end. We need to face the naked truth as candidly to-day as did the Fathers in their creative generation.

Massachusetts and Connecticut temporarily became proponents of State's Rights and of a State's prerogative to decide for itself upon Constitutional questions, in 1808 when the famous "Embargo" threatened their commerce.<sup>1</sup> Pennsylvania carried similar selfishness to the point of armed rebellion shortly afterward. Refusing to submit to a judgment involving the liquidation of an ancient debt<sup>2</sup> the State Legislature passed a Law directing its officers to disregard "any process whatever issued out of any Federal Court." In 1809, State troops carried this insurrection into physical effect. A Federal grand jury promptly indicted their commander. President Madison, then only a few months in office, refused to undertake a composition of the

<sup>1</sup> Charles Warren points out in his *Supreme Court in U. S. History*, I, 388: "Throughout American history, devotion to State's Rights and opposition to the jurisdiction of the Federal Government and the Federal Judiciary, whether in the South or in the North, has been based not so much on dogmatic, political theories or beliefs, as upon the particular economic, political or social legislation which the decisions of the Court happened to sustain or overthrow."

<sup>2</sup> The climax to this litigation came in U. S. *v.* Peters, 5 Cranch, 115.

breach. "The Executive," said he,<sup>1</sup> "is not only unauthorized to prevent the execution of a decree sanctioned by the Supreme Court of the United States, but is expressly enjoined by statute, to carry into effect any such decree, where opposition may be made to it." The defendants were tried, convicted and sentenced to fine and imprisonment.<sup>2</sup> Justice Bushrod Washington, far from yielding to impassioned clamor sweeping Pennsylvania or to counsels of fear, did not pass this sentence until he had adjourned his Philadelphia Court to the largest assembly hall in the city so that, as he said, the "citizens" who "manifest a deep interest in the results" could "witness the administration of the justice of the country, to which all men, great and small, are alike bound to submit." A sublimer Constitutional courage would be difficult to imagine. While it typifies the travail the Constitution has had to outlive, equally it typifies the undaunted vigor and independence of the men who, occupying the Supreme Court Bench, have put the administration of Federal Law beyond reproach.

On February 2, 1819, the Supreme Court de-

<sup>1</sup> April 13, 1809.

<sup>2</sup> They were later pardoned when excitement had died down.

cided the famous "Dartmouth College Case"<sup>1</sup> forbidding impairment, by State action, of the obligation of contracts—the "contract," in this instance, being a private corporate charter. By this finding, the development of American Law embarked upon a new epoch.<sup>2</sup>

A few weeks later came the great pronouncement which established the powerful doctrine of "implied Constitutional powers"<sup>3</sup> and put "the most formidable weapon into the armory of the Constitution."<sup>4</sup> It was the doctrine of Governmental self-sufficiency which Hamilton had unanswerably apostrophized in the whole fabric of his Federalist papers, and which he had specifically developed in convincing President Washington of the Government's power to charter a National Bank of the United States.<sup>5</sup> Chief Justice Marshall but para-

<sup>1</sup> *Dartmouth College v. Woodward*, 4 Wheat., 518.

<sup>2</sup> Sir Henry Maine in his *Popular Government*, 1885, p. 247, says this decision, pursuant to Daniel Webster's tremendous and oft-quoted argument, proved to be "the bulwark of American individualism against democratic impatience and socialistic fantasy."

<sup>3</sup> *McCullough v. Maryland*, 4 Wheat., 316.

<sup>4</sup> *Life of Hamilton*, by Henry Cabot Lodge.

<sup>5</sup> "The means ought to be apportioned to the ends; the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained." *Federalist*, No. 22. "Not to confer a degree of power commensurate to the end, would be to violate the

phrased Hamilton when his decision in this case said: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are Constitutional."<sup>1</sup> Not only because the decision startled

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most obvious rules of prudence and propriety, and improvidently to trust the great interests of the nation to hands which are disabled from managing them with vigour and success." *Federalist*, No. 22. "A power equal to every possible contingency must exist somewhere in the government." *Federalist*, No. 26. "A government ought to contain in itself every power requisite to the full accomplishment of the objects committed to its care, and to the complete execution of the trusts for which it is responsible, free from every other control but a regard to the public good and to the sense of the people." *Federalist*, No. 31. Quoting the Annapolis Convention Resolutions demanding the Philadelphia Convention "to devise such further provisions as shall appear to them necessary to render the Constitution of the federal government adequate to the exigencies of the Union." Also quoting the Congressional resolution, calling the Philadelphia convention to provide "means of establishing a firm national government" and to "render the federal Constitution adequate to the exigencies of government and the preservation of the Union." *Federalist*, No. 40. "Its propriety rests upon the evidence of this plain proposition, that EVERY GOVERNMENT OUGHT TO CONTAIN IN ITSELF THE MEANS OF ITS OWN PRESERVATION." *Federalist*, No. 59.

<sup>1</sup> *The Greatest American, Hamilton*, by Vandenberg, 229.

the loose constructionist who looked askance at growing Constitutional authority, but more particularly because it upheld the Constitutionality of the Bank of the United States—stormy petrel of American politics through many crucial years—it re-aroused a veritable hurricane of hostile reaction. The decision itself invalidated Maryland's effort to tax the Bank out of existence in that State, a recourse widely indulged by other States by its political opponents. Virginia promptly took up the old cudgels in a new demand for a new and different tribunal to adjudicate questions involving State and Federal powers.<sup>1</sup> Pennsylvania, supported by the Legislatures of several other States, asked a Constitutional Amendment confining the Bank to the District of Columbia.<sup>2</sup>

Throughout these maneuvers, of course, persistent detractors were leaving no slur upon the Court itself unuttered. But it remained for Ohio to provide the hostile action which brought the disease to crisis, and, therefore, to cure. Despite the Su-

<sup>1</sup> "It is to be noted that this antagonism to the Court arose NOT from its exercise of its powers to hold an Act of Congress invalid, but from its failure to do so."—*Supreme Court in U. S. History*, by Charles Warren, i, 514.

<sup>2</sup> Senator Logan of Kentucky unsuccessfully moved for such an Amendment by Senate Resolution, December 28, 1819.

preme Court's ruling in the Maryland case, Ohio proceeded to collect an annual tax of \$50,000 on each Bank Branch in that commonwealth, and, violating a temporary injunction obtained by the Bank, forcibly entered its vaults and sequestered \$120,475. Some gantlet the vindication of Constitutional authority has had to run in the United States! The Bank countered with legal process which committed the State Treasurer to prison when he refused to restore the funds, and which reclaimed the money as forcibly as it had been first appropriated. The Ohio Legislature, aroused to pyramiding passion, passed a statute completely outlawing the Bank<sup>1</sup> and memorialized other Legislatures to join it in embracing the familiar doctrines of State supremacy over Constitutional questions, as enunciated in the Kentucky and Virginia Resolutions of 1798-99. But since the resolutions received scant external encouragement, and the Courts proceeded relentlessly to protect their power, and the return of business prosperity ameliorated prejudice against the Bank, the case was essentially a dead issue when finally decided against Ohio, March 19, 1824.

Meanwhile, always pulling up-stream against

<sup>1</sup> January 29, 1821.

strong currents of prejudice and opposition, the Supreme Court's decisions had been building new Nationalistic strength for the Constitution in other directions. One verdict on March 3, 1821, fixed Federal jurisdiction, under the Constitution, in all criminal cases arising in State Courts in which a Federal question is involved<sup>1</sup>; another, on March 2, 1824, established the broad extent of Federal power over internal commerce<sup>2</sup>—an “opinion which has done more to knit the American people into an indivisible Nation than any other one force in our history, excepting only war.”<sup>3</sup> But it must be remembered that then, as now, there were puissant factions which hoped the “knitters” would “drop their stitch.” Both decisions excited the usual animadversions from those who were jealous of the Constitution and the Court. Kentucky's proverbial anger particularly rekindled under a series of contemporary decisions invalidating the State's land and debtor laws.<sup>4</sup> The usual Legislative resolutions advocated a curb on the Judiciary; threats of personal violence were made against Judges; impeachments were unsuccessfully at-

<sup>1</sup> *Cohen v. Virginia*, 6 Wheat., 264.

<sup>2</sup> *Gibbons v. Ogden*, 9 Wheat., 1.

<sup>3</sup> *Life of Marshall*, by Albert J. Beveridge, iv, 429.

<sup>4</sup> *Green v. Biddle*, 8 Wheat., 1.

tempted; and the use of physical resistance was intimated but abjured. Congress, too, was besieged with various proposals looking toward the Judiciary's emasculation. These ranged from a proposed Constitutional Amendment giving the Senate appellate jurisdiction in cases involving State's Rights<sup>1</sup> to a Bill requiring the concurrence of five of the seven Justices to invalidate a State Law.<sup>2</sup> Thus, again, it appears that the history of sturdy Constitutional Law and precedent has been a constant and unremitting battle—an everlasting appeal from "Philip drunk" to "Philip sober"; and since human nature is quite the same in every age, it is not surprising that modern generations should not find themselves immune to kindred disturbances. But all efforts to hobble a vigorous, independent, effective Federal Judiciary failed in this era when the Republic wore its swaddling clothes—"an amazing tribute to the popular confidence in that tribunal"<sup>3</sup>—and this record of yesterday is wholesome admonition for us in the flux of to-day and the recurrent uncertainties of to-morrow.

<sup>1</sup> Offered by Senator Richard M. Johnson of Kentucky, December 12, 1821.

<sup>2</sup> Reported March 11, 1824, by Senator Martin Van Buren of New York.

<sup>3</sup> *Supreme Court in U. S. History*, by Charles Warren, ii, 131.

The period of Daniel Webster's greatest service to the Union now came into full fruit. While Webster had served as counsel in many of the paramount cases through which the Supreme Court, usually favoring his arguments, had consolidated the Constitution's victories, he now threw his superb talents into a Congressional exposition of the Supreme Court as an indispensable head-stone in the American system of Government. On January 26 and 27, 1830, he uttered his immortal "Reply to Hayne"<sup>1</sup> and sounded not only the key-note of American Union, but also an unanswerable defense of the functions and the posture of the American Judiciary. He brought Hamilton's *Federalist* down to his time, amplified it to suit expanded necessity, and builded the intrenchments behind which Constitutionalism was destined to save its life. Through three subsequent months a fateful debate monopolized the attention and the prejudices of Congress. The Court did not lack for other able knights to bear a lance in the battle for its life. Senator David Barton of Missouri deplored the ease with which "the Court may

<sup>1</sup> A speech by Robert Y. Hayne of South Carolina, January 19 and 25, 1830, supported Calhoun's doctrine of "nullification"—the right of a State to veto Law deemed by a State to be unconstitutional but which had been held valid by the Court.

be rendered odious by making it a topic of electioneering discussion" and of "popular declamation." Senator John M. Clayton of Delaware cried out that there was no other recourse "to save us from the horrors of anarchy than the Supreme Court." "The crisis of our Constitution is now upon us," wrote Marshall to Justice Story; "a strong dispensation to prostrate the Judiciary has shown itself." But Webster was the Giant who struck the most dynamic blows in rallying public confidence to sustain the defenses of the Constitution. "No one can overestimate the potent influence in maintaining such confidence which is to be attributed to Webster's soul-stirring appeal in behalf of the Union and judicial supremacy"; and history has confirmed the contemporary view of his great speech—that "if his name were unwritten in the Legislative and Judicial history of the country, he has now inscribed it upon a monument, in letters so legible and so durable that it will be read and remembered, as long as there is an American to read and rejoice in the glory of his country."<sup>1</sup>

The doctrine of nullification, denying every basis urged by *The Federalist* for imperishable Union, now graduated from theory to practice;

<sup>1</sup> *The Supreme Court in U. S. History*, by Charles Warren. II, 188.

and the result was to modify the impatient views of many who upheld it in the abstract, but who were chastened in the awful presence of the concrete.<sup>1</sup> Further, the new crisis wrought an ultimate coalition of Webster, Marshall and Andrew Jackson in implacable support of the Constitution and the Court—as powerful a trinity as ever battled for a desperately important cause.<sup>2</sup> Georgia

<sup>1</sup> *The Federalist*, No. 15, said: “I have unfolded to you a complication of dangers to which you would be exposed, should you permit that sacred knot which binds the people of America together to be severed or dissolved by ambition or by avarice, by jealousy or by misrepresentation.” From one end to the other, *The Federalist* pleaded this fundament, lest the country be “numbered among the melancholy victims of misguided councils.”—No. 14.

<sup>2</sup> Webster once said to Thurlow Weed that “Jackson has a violent temper which leads him often to hasty conclusions,” but “he is an honest and upright man who does what he thinks is right, and does it with all his might; his patriotism is no more to be questioned than that of Washington.” Though he violently disagreed with Webster and Marshall in most of their political beliefs, he was an unsurrendering friend to the idea of indivisible Union. It is typically related of him that after Harvard had conferred its coveted degree of Doctor of Laws upon him, as he was concluding his speech, an irreverent auditor shouted out: “You must give ‘em a little Latin, Doctor.” No whit abashed, the grizzled old Hickory solemnly doffed his hat, stepped forward to the front of the platform and uttered these words, fraught with meaning for all: “E Pluribus Unum, my friends, sine qua non!” He thus spoke volumes in a phrase just as *The Federalist*, No. 7, had done when it declared that

questioned the right of the Supreme Court to order it to defend a case testing its exclusion of Cherokee Indians from Georgia lands guaranteed to the Cherokee Nation by the "Treaty of 1791"; and, before the suit was begun, it further aggravated the situation by hanging an Indian, for murder, despite a writ of error issued against it by the Supreme Court. This was practical nullification. It recrystallized the great issue which had been throbbing through our history for years, and renewed the mobilized attack of those who believed in Constitutional sabotage.<sup>1</sup> James Madison, a patriarch of the Constitution, said at the time: "The jurisdiction claimed for the Federal Judiciary is truly the only defensive armor of the Federal Government, or rather for the Constitution and the Laws of the United States; strip it of that armor, and the door is wide open for nullification, anarchy and convulsion." The Georgia Legislature voted defiance. In the absence of any appearance on

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"'Divide et Impera' must be the motto of every nation that either hates or fears us." *N. Y. Times Magazine*, September 3, 1922.

<sup>1</sup> One contemporary Congressional effort to strip the Court of jurisdiction over State Laws was defeated January 29, 1831, in the House by a vote of 158 to 51; and another effort to limit the term of Federal Judges was defeated by a vote of 115 to 61.

behalf of the State, the Supreme Court decided, favorably to Georgia, that it lacked jurisdiction in this specific instance, although it did not hesitate to observe that all the humanities were with the Indians. But the problem promptly recurred in new form when another writ of error commanded Georgia's appearance in the Supreme Court because of the imprisonment of two missionaries to the Cherokees. Again the Governor scorned the summons. Again the State Legislature voted resistance. On March 3, 1832, the case was decided against Georgia and the missionaries were ordered released. The order was ignored. The eyes of destiny turned quizzically toward President Jackson, whose uncompromising antipathy to a renewal of the Charter of the Bank of the United States, was interpreted by partisan foes as the harbinger of Executive refusal to support the Court in any of its Nationalistic tendencies.

When Georgia's sullen indiscretion was followed by States' Rights rumblings in New York<sup>1</sup> and in Massachusetts<sup>2</sup>; and when the spirit of the times

<sup>1</sup> Incidental to the cases of *New Jersey v. New York*, 5 Peters, 284.

<sup>2</sup> Incidental to the "Warren Bridge Case" in which the Massachusetts Democratic Convention of 1831 said the "Supreme Court has no more Constitutional right to meddle than the Court of King's Bench."

flamed into South Carolina's adoption of its Nullification Ordinance on November 24, 1832, denying all State jurisdiction to the Supreme Court, President Jackson struck for Union and struck with a bludgeon. He called treason by its name. He at once issued his celebrated Proclamation of December 10, 1832, and recommended to Congress that it clothe the Courts with power adequate to deal with rebellion against them. The "Force Bill" followed; and, with it, a National awakening to the need for the stern support of the supremacy of the Constitution as interpreted by the Supreme Court. Jackson served a mighty emergency, nobly, courageously and well.<sup>1</sup> Georgia realized that the President's insistence upon the supremacy of National authority in South Carolina meant that he would strike down disobedience in any other State. It composed its wrath and pardoned the

<sup>1</sup> Jackson often has been quoted as asserting that he, as an Executive officer, had a right to judge for himself whether an Act of Congress was Constitutional, regardless of the Supreme Court; but Chief Justice Taney wrote that no "intelligent man" could thus misconstrue the Jackson theory—viz. that he could follow his own judgment on a Constitutional question when a Law was in the process of making and while he participated in its creation, but that this option disappeared when once a Law was completed. Jackson was a "friend in need" to the cause of a solidified Union, and this point deserves emphasis.

missionaries. Another rampart was added to the defenses of Constitutional Laws as charted by *The Federalist* and as chaptered by the Supreme Court.

Chief Justice Marshall died on July 6, 1835, rightly mourned as one of the greatest and most useful Americans who ever lived to dedicate a matchless brain and courage to the institutions of ordered liberty. "Providence grants such men to the human family only on great occasions to accomplish its own great end," said Associate Justice Story. Roger Taney was Marshall's successor. At first a tendency to let down the bars of strict National construction of the Constitution was feared; but there proved to be no real relaxation in the determination of the Court to uphold the National dignity and sovereignty in any case where it was really attacked; in fact, in the succeeding years, Chief Justice Taney went even farther than Marshall had been willing to go in extending the jurisdiction of the Federal Courts.<sup>1</sup>

Since the purpose of this chapter is confined to a quick inventory of basic popular frictions involving the Court's development of power—the lineal antecedents of modern frictions in kind—many momentous Court decisions at this time must lie outside

<sup>1</sup> *Supreme Court in U. S. History*, by Charles Warren, ii, 307.

our jurisdiction. But the dark climax in these frictions, whose fires burned on the altars of abolition and of slavery, one as uncompromising as the other in its impassioned zeals, cast its shadows ahead and enveloped every event. History wrote with rushing pen. In the 1841 term, the Court faced, but was able to avoid, the problem which later was to precipitate rebellion in the Dred Scott case.<sup>1</sup> In 1842 the curse recurred<sup>2</sup>; and this time the Court unanimously held that the power of Congress over fugitive slaves was exclusive. The North complained that this did not permit it to be sufficiently drastic, through the medium of State statutes, in protecting fugitives; indeed the North was soon to become as violently insistent upon "States' Rights," to fit this emergency, as ever was the South. Meanwhile, the South complained that the decision invaded "States' Rights" and did not permit it adequate sovereignty to hold slaves in leash. It was the irrepressible conflict. Justice Story, in the midst of this inscrutable contact, said: "I shall never hesitate to do my duty as a Judge under the Constitution and Laws of the United States, be the consequences what they may; that Constitution I have sworn to support, and I

<sup>1</sup> *Groves v. Slaughter*, 15 Pet., 449.

<sup>2</sup> *Prigg v. Pennsylvania*, 16 Pet., 539.

cannot forget or repudiate my obligations at pleasure."<sup>1</sup> The final result of this decision was to force a new and stronger Federal fugitive slave law in 1850, and thus to hasten the fatal breach.

The deep irritations of the time found a ready target in the Supreme Court. The old arguments, re-dressed, moved into renewed activity again. James Buchanan of Pennsylvania again insisted that the Courts had no business over-riding Congress: "I would never hold myself bound by the decision of the Judiciary, whilst acting in a Legislative character," said he.<sup>2</sup> On the other hand, the New York *Herald* declared: "The Supreme Court is our last bulwark, our fortress, our rock and tower of defense when all else fails." Justice Woodbury, announcing a decision upholding the Constitutionality of the fugitive slave law of 1793<sup>3</sup> said: "This Court has no alternative, while they exist, but to stand by the Constitution and Laws, with fidelity to their duties and their oaths; their path is a

<sup>1</sup> *Life and Letters of Story*, by William Waldo Story, 1851, ii, 430.

<sup>2</sup> In his inaugural address, March 4, 1857, President Buchanan subsequently said, referring to a prospective decision in the Dred Scott case by the Supreme Court: "To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be." A totally different attitude.

<sup>3</sup> *Jones v. Van Zandt*, 5 Howard, 215.

straight and narrow one, to go where the Constitution and Laws lead, and not to break both by traveling without or beyond them." Justice McLean, himself an implacable abolitionist, warned the anti-slavery forces not to go too far. "It is an easy matter," said he, "to denounce the action of any Court who may differ from our own views, and thereby lessen the public confidence in such Court." Important admonitions, all these—and absolutely applicable, in changed circumstance, but not in changed necessity, to conditions in America to-day and to-morrow! "As a lover of the Union, I am willing to abide the Supreme Court's solemn decision," declared Congressman Richard W. Thompson of Indiana; "nothing can be more dangerous to our peace and prosperity as a Nation than these repeated attempts to appeal from the decision of our highest Courts to the tribunals of party and of faction; I hold that man to be enemy to the public welfare and the public peace, who, for political party purposes, seeks to array popular prejudice against the Constitution and Law, thus settled and fixed."<sup>1</sup>

But, over and against these views, Charles Sumner, in the Senate of 1852, declared that while he had respect for the Supreme Court, he declined

<sup>1</sup> 30th Congress, 2d Session.

to acknowledge its authority as binding upon Congress; and, meanwhile, several States suited their actions to their equally hostile motives. In Ohio a State Court denied the validity of the appellate jurisdiction of the Federal Supreme Court.<sup>1</sup> In California a State Court refused acquiescence in the Supreme Court's jurisdiction<sup>2</sup>—although the California Legislature promptly cured the insurrection by statute. In Wisconsin, a State Court actually released a prisoner, convicted in Federal Court.<sup>3</sup> The entire North, seemingly, was tinctured with the belief that the Supreme Court was the “citadel of slavery”—when, as a matter of retrospect, we know it was but the “citadel” of a written Constitution and the Laws pursuant thereto. So imminent was trouble that a leading Law<sup>4</sup> magazine called the country to a contemplation of its dangers. “Admit that the Federal Judiciary may in its time have been guilty of error, that it has occasionally sought to wield more power than was safe, that it is as fallible as every other human institution. Yet it has been and is a vast agency for good; it has averted many a storm which threatened our peace,

<sup>1</sup> *Stunt v. Ohio*, 3 Ohio Decisions Reprint, 362.

<sup>2</sup> *Johnson v. Gordon*, 4 Calif., 368.

<sup>3</sup> *In re Booth*, 3 Wisconsin, 1, 49.

<sup>4</sup> *The American Law Register*, January, 1856.

and has lent its powerful aid in uniting us together in the bonds of Law and Justice. Its very existence has proved a beacon of safety. And now, when the black cloud is again on the horizon, when the trembling of the earth and the stillness of the air are prophetic to our fears, and we turn to it instinctively for protection—let us ask ourselves, with all its imagined faults, what is there that can replace it? Strip it of its power, and what shall we get in exchange? Discord and confusion, statutes without obedience, Courts without authority, an anarchy of principles, and a chaos of decisions, till all Law at last shall be extinguished by an appeal to arms!" Noble apostrophe! Sounded in the very mold of *The Federalist* which pleaded, years before, that Americans should solemnly compare what they might believe to be the Constitution's disadvantages, with the lethally greater disadvantages which would attach to the Constitution's defeat.<sup>1</sup> Well may the challenge give us a pause in 1923 which was impossible in 1856!

The crashing climax to nearly ten years of accumulating abolitionist propaganda against the

<sup>1</sup> *The Federalist*, No. 38: "It is a matter both of wonder and regret that those who raise so many objections against the new Constitution, should never call to mind the defects of that which is to be exchanged for it."

Court, came with the decision in the case of Dred Scott, a Missouri slave for whom freedom was claimed when his master temporarily took him into free territory. The case was decided March 6, 1857.<sup>1</sup> Six Justices concurred in holding that a negro could not be a citizen, also that Congress had no power to exclude slavery from the territories. Three Justices dissented in one way or another. The effect upon the North was electric. Profound anti-slavery zeal and anti-Court prejudice flamed as under the influence of oil poured upon a smoldering conflagration. In the calm light of history, it might be said that criticism of the Court was justified only on the theory that the Court should have pronounced the Law as it ought to have been—and as subsequently made by Constitutional Amendment—rather than as it was. But those who took this view—and those who take it in relation to the problems and the Court to-day—neglect to realize that if the Court shall ever thus proceed, the Court will be assuming Legislative, in addition to Judicial, functions, and thus it will be guilty of invading the prerogatives of another independent branch of the Government. These critics, at best too jealous of the Court, recommend to it a usurpation which, if accomplished, they themselves would be the first

<sup>1</sup> *Dred Scott v. Sanford*, 9 Howard, 393.

and the loudest to condemn. Nevertheless, there are many able legal historians to-day who condemn the Dred Scott decision as a "gross abuse of trust."<sup>1</sup> Certainly they are at least correct to the extent of reflecting a contemporary view so rabid that the country's faith was frightfully weakened and the reputation of the Court was flung into fifteen years of jeopardy.

Indeed, four months after Chief Justice Taney's death, a Bill to place his bust in the Supreme Court room was lost<sup>2</sup> amid vindictive anathema. Senator Henry Wilson of Massachusetts in this debate called the Dred Scott decision "the greatest crime in the judicial annals of the Republic" and said Taney was "recreant to liberty and humanity." The factious spirit of the times, inspired by a mighty moral impulse, moved Northern abolitionists to these extremes in the face of any policies which did not wholly and immediately support their exalted purpose to wipe the curse of slavery from the Republic at any cost. Webster had faced these storms in 1850 because he assessed an even greater value to the preservation of Constitutional Union than to the extermination of serfdom. In

<sup>1</sup> *The Supreme Court in United States History*, by Charles Warren, iii, 38.

<sup>2</sup> It subsequently passed on January 29, 1874.

this he but anticipated the posture of Lincoln. Yet, despite his pronounced anti-slavery views and his impeccable record of patriotic service, he was thunderously maligned because he was unwilling to help precipitate the Rebellion a decade before it could have been won for Liberty and Union.<sup>1</sup> It is not surprising, if the superb Webster, long idolized in the North for his exalted leadership, was the victim of the time's impatience, that the Supreme Court—less blessed with spectacular opportunities to win mass applause—should have been a shining target for contumacious impetuosity: but as time has vindicated the wisdom and the motives of the one, so has it, to large degree, the other.

Hot Northern counsels recommended defiance to the Dred Scott decision. Typical of journalistic wrath, *The New York Independent*<sup>2</sup> said: "If the people obey this decision, they disobey God." On the other hand, sober warnings were sounded like the admonition of *The New York Commercial Advertiser* which, while deplored the Court's

<sup>1</sup> Dr. Frank Bergen, in a privately circulated work on Webster, *Yale University Press*, June, 1918, says of Webster at this time: "An agitator may well demand what is possible at some time; but a statesman, in order to accomplish anything, must consent to what is presently possible."

<sup>2</sup> December 17, 1857.

conclusions, condemned its incontinent critics: "Such a course, though it may be congenial with our temper at the moment, is sadly perilous to the common weal, the interest of freedom and free Government being always best upheld by maintaining respect for the officers of Government, particularly those of the Judiciary." The Washington Union<sup>1</sup> added that "fanaticism ceases to be a formidable enemy when it seeks to measure strength with the Union-loving spirit of the people, sustained or confirmed by the great arbiter of Constitutional questions."

But America was marked for the Rebellion. If the Court's decision figured in it—and certainly it was the storm center of the fateful debates which now rushed Congress to the abyss—it figured as an excuse rather than as a reason. Slavery and nullification themselves were the real dynamite. Northern Republicans suddenly embraced the ancient doctrines of Jefferson as to a curbed Court, only to discard these doctrines again when the South used them to recommend State sovereignty and to license secession. Brave words were those of George E. Pugh of Ohio, who, though disagreeing with the Dred Scott verdict, said: "Whatever may be my opinion as an individual, both as a Senator

<sup>1</sup> March 11, 1857.

and a citizen, the judgment of the Court must be carried into effect; we cannot live an hour under any other doctrine." Lincoln's view was the correct one; and it is important that this view be made plain, because in recent years, Lincoln has been erroneously quoted as an authority for denying the Supreme Court's right to pass upon the Constitutionality of Acts of Congress. Two years before his Douglas debates, speaking of slavery and the Constitution<sup>1</sup> he said: "The Supreme Court of the United States is the tribunal to decide such a question, and we will submit to its decisions." Later<sup>2</sup> he said: "We believe in obedience to, and respect for, the Judicial department of Government. We think its decisions on Constitutional questions, when fully settled, should control not only the particular cases decided, but the general policies of the country, subject to be disturbed only by Amendments of the Constitution, as provided in that instrument itself. More than this would be revolution. We think the Dred Scott decision is erroneous. We know the Court that made it has often over-ruled its own decisions, and we shall do what we can to have it over-rule this. But we offer no resistance to it." He added in his first inaugural

<sup>1</sup> Galena, Illinois, August 1, 1856.

<sup>2</sup> Springfield, Illinois, June 26, 1858.

message in 1861 that the evil of possible error in the Court's conclusions "can better be borne than could the evils of a different practice." Lincoln knew the philosophy of *The Federalist*<sup>1</sup> which reminded America, upon another occasion, that "the injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones." We need to know both Lincoln and *The Federalist* to-day.

It is unnecessary, and outside our purpose, to detail the heroic story of the Civil War—a household legend in America. Our objective is reached by touching the high-lights of history as they have exemplified the key-stone status of the Supreme Court in the preservation of the Constitution and the conflict through which the Court has persevered in its indescribably great and essential function as the Compass of the Constitution, steady alike in calm and storm. Suffice it to say that Lincoln frequently found it necessary, in the face of military exigency, to go outside the Constitution in pursuit of powers equal to the crises he faced, and that Chief Justice Taney did not hesitate, in one such circumstance, to question the legality of the suspension of the writ of habeas corpus by his

<sup>1</sup> No. 73.

famous decision in "Ex Parte Merryman." Again he was stormily condemned as a friend to rebels; but his doctrines were wholly vindicated four years later when the Court, composed largely of Republicans appointed by Lincoln, unanimously joined in denouncing the Executive establishment of military tribunals in States where the civil Courts were open.<sup>1</sup> The latter decision was delivered by Justice David Davis, Lincoln's personal friend, who said: "The Constitution of the United States is a Law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." That this decision, which has since been recognized by all men as the palladium of the rights of the individual, should have been so generally compared, at the time of its rendition, with the Dred Scott case is a striking commentary on the impassioned political conditions of the era.<sup>2</sup> Congressional reprisals again were hotly offered. One program suggested the enlargement of the Court so that it might be "packed" with new Judges who were known to favor Reconstruction under military jurisdiction.<sup>3</sup> Another proposed a Constitu-

<sup>1</sup> *Ex Parte Milligan*, 4 Wall, 2.

<sup>2</sup> *The Supreme Court in United States History*, by Charles Warren, iii, 154.

<sup>3</sup> *Harper's Weekly*, 1867

tional Amendment to abolish the Court entirely.<sup>1</sup> In 1866 the size of the Court actually was reduced in order to deprive President Johnson of the opportunity to fill a vacancy. But the Court went its Constitutional way with two further kindred decisions that rose above post-war prejudice<sup>2</sup> and insisted upon the preservation of individual rights.

The authority of the whole Reconstruction Program was involved, in one way or another, in these Court proceedings and it was inevitable that friction should graduate again into open breach. The South—historically the source of opposition to the Court's interference with Acts of Congress—now looked to the Court to do the very thing it had previously proscribed and to void these Reconstruction Laws. They found, by experience, that *The Federalist*, after all, was sound in its recommendations. Congress, on the other hand, was bent on forestalling any such check-mate. The House passed a Bill providing that in any case involving the validity of a Congressional Act, two-thirds of the Justices must concur in an opinion adverse to the Law.<sup>3</sup> But the familiar old

<sup>1</sup> Congressman John A. Bingham of Ohio in 39th Congress, 2d Session.

<sup>2</sup> Cummings *v.* Missouri and *Ex Parte Garland*, 4 Wall, 277, 333.

<sup>3</sup> 40th Congress, 2d Session.

expedient failed in the Senate. Another unsuccessful proposal would have specifically refused jurisdiction to the Court in relation to Reconstruction Acts. Finally on March 12, 1868, the House initiated a repeal of the Supreme Court's appellate jurisdiction under the Habeas Corpus Act of 1867 and aimed it particularly at pending cases; the Senate concurred; President Johnson interjected a vigorous veto; and Congress passed the legislation over his head.<sup>1</sup> Thus was consummated an attack which confessed, on its face, the unconstitutionality of the Congressional purposes which it was manifestly feared and correctly assumed the Supreme Court would stop—an attack which has been characterized as "an abominable subterfuge on the part of Congress, and a shameful abuse of its powers."<sup>2</sup> It was the sort of thing against which Washington warned in his Farewell Address.<sup>3</sup> "Toward the preservation of your Government and the permanency of your present happy state, it is requisite not only that you steadily discountenance irregular

<sup>1</sup> This appellate jurisdiction was restored, in more temperate times, seventeen years later by Act of March 3, 1885.

<sup>2</sup> *Reconstruction and The Constitution*, by John W. Burgess, 196.

<sup>3</sup> It is pertinent to a study of Hamiltonism and *The Federalist* to observe in this connection that Hamilton was substantially the real author of the Farewell Address.

oppositions to its acknowledged authority, but also that you resist with care the spirit of innovations upon its principles, however specious the pretexts; one method of assault may be to effect in the forms of the Constitution alterations which will impair the energy of the system, and thus to undermine what cannot be directly over-thrown; . . . Liberty is, indeed, little else than a name where the Government is too feeble to withstand the enterprises of faction to confine each member of the society within the limits prescribed by the Laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property." Fortunately for America, there have been few occasions when this advice has been transgressed; but the cycle of impatience and unrest is upon us again in this modern day and the import of the words of the Father of his Country should not be lost upon our modern counsels.

One year after the assault of 1868, another effort was made to delimit Supreme Court jurisdiction over "the decisions of the political departments of the Government on political questions."<sup>1</sup> But typical of the country's sober reaction, an editorial protest of *The New York World*<sup>2</sup> may be quoted:

<sup>1</sup> 41st Congress, 2d Session.

<sup>2</sup> January 8, 1870.

"If Congress can force the Judicial power to yield to it, the Constitution is annulled." When Senator Charles D. Drake of Missouri followed<sup>1</sup> with an even more drastic inhibition, providing that no Court should have any power to adjudge invalid an Act of Congress, *The World* called it "a Bill to abolish the Constitution entirely." The Chicago *Republican* commented in words well worthy of modern repetition at a moment when the Drake proposal, in new dress, again impends: "The truth is, Mr. Drake's proposition is in outrageous repugnance to the whole genius of republican Government; and he will find, we believe, but few sympathizers with his revolutionary scheme, either in Congress or among the people; we cannot give up our Courts at present, even though experience has shown that they are not always infallible; they are safer to trust to, in matters of Constitution and Law, than a tribunal selected as Congress is." All of these subsequent Congressional ambuscades came to nought—and through all this factious turmoil, the great Court went the even tenor of its way, "declining ungranted jurisdiction, but exercising firmly that which the Constitution and the Laws confer."<sup>2</sup>

<sup>1</sup> December 13, 1869.

<sup>2</sup> The language of Chief Justice Chase in *Ex Parte McCordle*, 7 Wall, 506.

There was further ruction when the Court reversed itself within fifteen months, in 1871, in the famous "Legal Tender Cases,"<sup>1</sup> and again when it established the inviolability of municipal bonds and refused their repudiation.<sup>2</sup> There was bound to be partisan discussion, too, when the Court refused to construe the scope of the new Fourteenth Amendment<sup>3</sup> as denying to the States authority over local monopoly,<sup>4</sup> and again when it specifically licensed the States to regulate monopoly and rule corporations and to fix public service rates.<sup>5</sup> The doctrine thus announced was subsequently circumscribed by a requirement that rates must be "reasonable"<sup>6</sup> and that the rate power must not go to the extremes of "confiscation without due process of Law."<sup>7</sup> But, in the main, the Court

<sup>1</sup> *Hepburn v. Griswold*, 8 Wall, 603; *Knox v. Lee*, 12 Wall, 457.

<sup>2</sup> A long series of these cases ultimately aroused such antagonism that as late as 1893, the Governor of Missouri, in a message to the Legislature, demanded action "to assert the outraged dignity of the State against usurpation of power by the Federal Judiciary."

<sup>3</sup> Proclaimed July 28, 1868.

<sup>4</sup> *Slaughter House Cases*, 16 Wall, 36.

<sup>5</sup> These were the so-called "Granger Cases," principal among which was *Munn v. Illinois*, 94 U. S., 113.

<sup>6</sup> As in *Stone v. Farmers Trust Company*, 116 U. S., 307.

<sup>7</sup> In *C. M. & St. P. Ry. v. Minn.*, 134 U. S., 418, the Court "repudiated the doctrine of uncontrolled rights on the part

moved into an era of practical immunity from assault for nearly a decade under Chief Justice Waite.

In 1884, criticism broke out anew when the Court further expanded the "implied powers" of Congress and consented to the Act making Treasury Notes legal tender, particularly announcing the new doctrine that the National Government possessed all powers belonging to other sovereignties unless withheld by express Constitutional restriction.<sup>1</sup> But the *New York Times* expressed the correct American posture for dissenters when it said that while the decision "cannot command respect, it must command obedience."

In the argument of *U. S. v. Lee*<sup>2</sup> involving the right of a citizen to hold Government officers to legal accountability, an incident occurred which further apostrophizes the indispensable creeds of Constitutional America. "Do I understand your position to be," said one of the Supreme Court Justices to Attorney Shipman, "that if the title to a piece of land on which the Government has set up a light-house should be disputed, the claimant might bring an action of ejectment, and, if success-

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of the Legislature to make rates, as emphatically as it repudiated the doctrine of uncontrolled rights on the part of agents of the corporations."

<sup>1</sup> *Juilliard v. Greenman*, 110 U. S., 421.

<sup>2</sup> 106 U. S., 196.

ful, remove the light-house?" "Certainly," replied the intrepid lawyer; "that is my position. Far better extinguish all the light-houses in the land than put out the light of the Law."<sup>1</sup>

Bitter assaults on the Court recurred again in 1895. By a vote of five to four, the Wilson-Gorman Income Tax Law was held unconstitutional.<sup>2</sup> The ultimate result of this decision was the Sixteenth Amendment to the Constitution proclaimed in 1913—demonstrating the proper and Constitutional method for the country to proceed when desiring to exercise a power denied by fundamental Law. As Washington said, again reverting to his Farewell Address: "If in the opinion of the people the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an Amendment in the way which the Constitution designates: but let there be no change by usurpation, for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed; the precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield." And this,

<sup>1</sup> Reprinted in *The Supreme Court in U. S. History*, by Charles Warren, iii, 396.

<sup>2</sup> *Pollock v. Farmers Trust Company*, 158 U. S., 601.

too, was the constant mandate of *The Federalist* as it preached not only to Americans of its own time, but also to posterity.

Equally bitter assaults followed validation of the injunction issued in the Pullman strike and riots of 1894.<sup>1</sup> It is worth while to observe that the Court spoke at this time as follows: "The strong arm of the National Government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails; if the emergency arises, the Army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its Laws; every Government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own Courts for any proper assistance in the exercise of the one and the discharge of the other." This doctrine but answered the question raised by *The Federalist*<sup>2</sup> when it asked: "How is it possible that a Government half supplied and half necessitous, can fulfill the purposes of its institution, can provide for the security, advance the prosperity, or support the reputation of the commonwealth?" The application is different, but the principle is constant.

<sup>1</sup> *In Re Debs*, 158 U. S., 564.

<sup>2</sup> No. 30.

Against these verdicts which we have catalogued, and against kindred decisions particularly involving the new industrial problem created by the advent and growth of Labor unions, vicious attacks upon the Court were renewed, reminiscent of the passion and the lexicon of 1821 and 1857 and 1868.<sup>1</sup> But the frenzy spent itself against the impregnable good sense of America. It re-flared ten years later when the New York Bakers' 10-hour-law was held unconstitutional<sup>2</sup>—the same old charge of “usurpation”; and the action of the Court in 1908 in restraining State officials from carrying out State Laws alleged to violate the Constitution brought a protest—more temperate, as it was more legitimate—which resulted in a 1910 statute forbidding the issue of such an injunction unless after hearing in a Court of three Federal Judges, one of whom should be a Supreme Court or Circuit Court Judge.

There was a futile flurry over “the recall of judicial decisions” in 1912 which failed as had every other major effort of similar purport since the organization of the Constitution. Then came the declared unconstitutionality of Child Labor Laws

<sup>1</sup> The Democratic National platform of 1896 inveighed against “oppression by which Federal Judges, in contempt of the Law of the States and the rights of the citizens, become at once Legislators, Judges and executioners.”

<sup>2</sup> *Lochner v. New York*, 198 U. S., 45

in 1918,<sup>1</sup> and again in the latest 1922 term of Court; and with them has come the old attack in new form—the proposal to permit Congress to exercise supreme Constitutional authority over its own Acts, without respect to the veto of an independent Judiciary. One famous commentator<sup>2</sup> finds but four possible decisions of the Supreme Court to which the proponents of this new-old emasculation could object, and says: “When serious error can be claimed in only four cases out of 564 involving the police power of the States, and out of the multitude involving the power of Congress acting under the commerce clause, it would seem that the evil complained of was practically non-existent; certainly no other branch of Government, and no other human institution, ever functioned with a slighter percentage of error.” He adds that “the American people will unquestionably conclude that final judgment as to their Constitutional rights is safer in the hands of the Judiciary than in those of the Legislature.” Says another authority<sup>3</sup>: “In times of political upheaval, of sectional animosity, of communistic uprising,

<sup>1</sup> *Hammer v. Dagenhart*, 247 U. S., 251.

<sup>2</sup> Junius Parker, *American Law Review*, 1896, xxx.

<sup>3</sup> *The Supreme Court in U. S. History*, by Charles Warren, iii, 466.

the nine quiet men who spend their lives away from the political field, free from the necessity of demagoguery, constitute the very sheet-anchor of the institutions of our land." Indeed, in the light of episodes of our own history, it would seem that a new and modernized edition of *The Federalist* might well say to Americans of to-day, as they face new attempts to strip the United States Supreme Court of its authority to defend the Constitution, exactly what the old *Federalist*<sup>1</sup> said to Americans of another time, as they too chafed under prospective Constitutional restraints: "If such men will make a firm and solemn pause, and meditate dispassionately on the importance of this interesting idea; if they will contemplate it in all its attitudes, and trace it to all its consequences, they will not hesitate to part with trivial objections to a Constitution, the rejection of which would in all probability put a final period to the Union; the airy phantoms that flit before the distempered imaginations of some of its adversaries would quickly give place to the more substantial forms of dangers, real, certain and formidable."

<sup>1</sup> No. 8.

## The Court—and its Latest Foes

“An ELECTIVE DESPOTISM was not the Government we fought for; but one which should not only be founded on free principles, but in which the powers of Government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limit, without being effectually checked and restrained by the others. For this reason, that convention which passed the ordinance of Government, laid its foundation on this basis, that the Legislative, Executive, and Judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.”—*The Federalist*, No. 48.

AN ELECTIVE DESPOTISM—though specifically repudiated by every properly interpreted declaration of the American Founders who played the master rôles in the creation of this Government—is the aim of the latest organized raid upon the Federal Judiciary; and, let it not be forgotten, that a raid upon the Judiciary, in these respects, is a raid upon the Constitution itself. There cannot be the slightest doubt where Hamilton would stand if he were here to-day. He would be Captain-General of the Hosts of the Constitution’s defenses

against this insidious, though superficially persuasive, assault; and with him would stand the resurrected spirits of every original Federalist who endorsed the Constitution and understandingly supported its creation. Perhaps this fact, of itself, is of small and meaningless consequence to the iconoclast. But when the logic of yesterday can be renewed, with unescapable challenge, in relation to the problems of to-day, it should not lessen the import of the argument to know that its honorable antecedents are as old and as time-tried as the Constitution itself.

This latest quest for an ELECTIVE DESPOTISM may be considered as inherently typical of all such onslaughts; and when taken to pieces and examined—and found loaded with poison—these laboratory findings may, in turn, be considered typical of the conclusions which would be reached if any of its kindred heresies were submitted to similar acid test. The examination is useful, therefore, not because this particular effort at Constitutional subversion can gain a following sufficient to raise it to the dignity of a menace, but because it affords a useful opportunity to specifically discover, in a concrete example, the threats to the Republic which lie hidden in all similar enterprises.

What is the new-old proposal? “If the Supreme

Court assumes to decide any Law of Congress unconstitutional, or, by interpretation, undertakes to assert a public policy at variance with the statutory declaration of Congress—which alone under our system is authorized to determine the public policies of Government—the Congress may by re-enacting the Law, nullify the action of the Court.”<sup>1</sup>

Stripped of verbiage, this means just one thing. Congress shall be made the supreme Constitutional authority in the United States. The Supreme Court of the United States shall be shorn of its Constitutional power to defend the Constitution against Congressional invasion. Whatever Congress wants to do, Congress shall be able to do—regardless of whether it rapes every virtue in the Constitution and its Bill of Rights. The original Constitutional theory of divided powers, and checks and balances, shall be tossed to discard and oblivion. Congress, not the Constitution, shall rule America. Doctrines of nullification—note that the quotation prophetically uses this very word—

<sup>1</sup> Address before the annual convention of the American Federation of Labor, at Cincinnati, Ohio, June 14, 1922, delivered by United States Senator Robert M. LaFollette of Wisconsin; printed in the Congressional Record of June 25, 1922, and reprinted as a Public Document by order of the Senate.

shall at last possess the Republic. We must transfer our fidelities from a representative Republic, under Constitutional restraints, to an **ELECTIVE DESPOTISM**, shorn of restraints.

When the American people yield to any such code as this, the Battle for the Constitution will have been lost—after one hundred and thirty years of successful combat against the forces of impatience and of faction, and of intemperance, and sometimes, even, of disloyalty.

These citizens, let it be understood, are wholly within their Constitutional rights in seeking this revolutionary change by the route of Constitutional Amendment. They must not be condemned as “direct actionists” who would substitute defiance for orderly evolution—even though their success would pave the way for “direct action,” in Governmental affairs, without regard to the Constitution. However much one may abhor the end they seek, one must admit that they propose a strictly Constitutional means to this end. Indeed, it is a rare compliment to the elasticity of the Constitution itself—amply refuting those capricious critics who constantly complain to the contrary—that lawful means prove to be at hand for the promotion, and the attainment, of reforms so convulsive in their character that they would de-

stroy the very genius of the Constitution itself. This is, in truth, a free country! If it were any "freer," Liberty would have to watch her step lest she slip into License!

If Hamilton, original spokesman for the Constitution, were here, he would respectfully but relentlessly scrutinize the arguments assuming to support the new Nullification; he would find in them the off-spring of many familiar fallacies which he, in his time, blasted; and, depending upon argument rather than anathema, regardless of the temptation to speak in hot phrases against a proposition that would cause "incurable disorder and imbecility in the Government,"<sup>1</sup> he would invite the American people to a sober contemplation of the dangers they are urged to embrace. Suppose we attempt that formula. What are the pretexts urged in favor of an ELECTIVE DESPOTISM, and what would be their consequence?

I. "The American Nation," declares Nullification's proponent, "was founded upon the immortal principle that the will of the people shall be the Law of the land."<sup>2</sup> This statement is sound as a bullet. *The Federalist*<sup>3</sup> said: "The fabric of American em-

<sup>1</sup> *The Federalist*, No. 9.

<sup>2</sup> Senator LaFollette's address, as printed in Senate Document, p. 16.

<sup>3</sup> No. 22.

pire ought to rest on the solid basis of THE CONSENT OF THE PEOPLE; the streams of national power ought to flow immediately from that pure, original fountain of all legitimate authority." Here, at least, we have agreement upon an initial hypothesis. The question, then, is: which method best protects "the will of the people"—the existing Supreme Court authority over Constitutional interpretations, or the proposed Congressional supremacy over the Constitution? And the moment we cut through sophistry, down to the bed rock of logic, we find the former utterly triumphant.

As the Constitution stands today, it is paramount in its sovereignty. It is the creation of the people, and only the "will of the people" can change it. When question arises as to what it means, the Supreme Court gives it interpretation. If, upon occasion, this interpretation indicates that the Constitution is contrary to the "will of the people," the people, by amendment, can suit it to their own decisions. If, upon other occasion, the Court should manifestly and deliberately attempt the usurpation of palpably unconstitutional power, the impeachment of the entire Court rests within the authority of Congress.<sup>1</sup> Lacking all Legislative

<sup>1</sup> *The Federalist*, No. 81: "There never can be danger that the Judges, by a series of deliberate usurpations on the

power, unable to initiate a single statute, confined in its operations to legalistic functions, and continuously answerable to Congress for its probity and virtue, it is a physical impossibility for the Supreme Court to ravish the "will of the people," or to far invade the realms of "Government by consent of the governed."

But contemplate the proposed alternative. If Congress can pass upon the Constitutionality of its own acts, without regard to the findings of an independent juridical umpire, how can the "will of the people" preserve the Constitution against invasions to which the people might wish to dissent? There is no opportunity for popular mandate to express itself by way of Constitutional Amendment, because Congress, possessing the affirmative power of legislation, could disregard the Amendment as readily as it disregarded the Constitution and created the usurpation which Amendment might seek to cure. There is no possibility of check-mate by impeachment, because a majority of Congress, intent upon usurpation, would never vote its own degradation; the same majority which voted usur-

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authority of the Legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations."

pation, would as promptly refuse to sanction a penalty against itself therefor. If it be said that the “will of the people” can express itself in a subsequent Congressional election, the answer is that this sort of proxy-referendum would create, to all intents and purposes, a new Constitution with every gathering of the ballots, and the “will of the people” would only govern their agents, and not the fundamental Charter of Government itself. That would continue to be whatever chameleon thing the transient whim of a political Congress might dictate. Indeed, Congress, having usurped Constitutional power, and dreading a popular accounting, might vote itself an indefinitely lengthened term—no Supreme Court could say it nay—and thus void all expression of the “will of the people” entirely.<sup>1</sup>

<sup>1</sup> *The Federalist*, No. 53, points out that in Great Britain, where the power of Parliament is transcendent, the Legislature has in several instances “actually changed by Legislative Acts some of the most fundamental articles of the Government. They have, in particular, on several occasions, changed the period of election; and, on the last occasion, not only introduced septennial in place of triennial elections, but by the same act continued themselves in place four years beyond the term for which they were elected by the people. An attention to these dangerous practices has produced a very natural alarm in the votaries of free Government, of which frequency of elections is the corner-stone; and has led them to seek for some security to liberty, against the danger to which it is exposed. Where no Constitution,

A curious way to serve "the immortal principle that the will of the people shall be the Law of the land"—to unleash an ELECTIVE DESPOTISM so omnipotent that it can even perpetuate itself in authority and laugh at its victims! To save themselves from that sort of enslavement, the "will of the people" would be left with no recourse other than armed rebellion. The Constitution would be as helpless as the people themselves.

Sober judgment, in the face of these contemplations, can reach no possible conclusion than that the "will of the people" finds an indispensable ally in the Federal Judiciary, and that the eviction of the Judiciary, far from facilitating popular control of ordered, Constitutional Government, would rob the people of the only guarantee they have that their "will" shall prevail.

If Hamilton were here, he would say that this nullification argument against the Judiciary "presents itself under a very specious and seducing form; and is well calculated to lay hold of the prejudices of those to whom it is addressed. But when we come to dissect it with attention, it will appear

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paramount to the Government, either existed or could be obtained, no Constitutional security similar to that established in the United States was to be attempted."

to be made up of nothing but fair-sounding words."<sup>1</sup>

II. It is next urged that the existing system must be changed because the Judiciary is trespassing, by gradual encroachment, upon the prerogatives of other departments of the Government. The remedy proposed for this alleged ailment, is to substitute Congress as a deliberate and premeditated and unchecked trespasser, and to strip the Judiciary of these prerogatives, not by any gradual encroachment, but by "putting the axe to the root."<sup>2</sup> Again the quotation uses prophetic words. No "axe" ever attacked the "roots" of a tree without threatening the branches, the leaves, and the fruit thereof.

Even if the indicated ailment existed, the remedy proposed would be infinitely worse than the disease, because it is a proposition beyond dispute that an unchecked Legislature, next to an unchecked Executive, is the most potentially dangerous tyrant conceivable. Talk about a Frankenstein! You can never make a Soviet out of a Supreme Court, hedged on all sides as is ours. You can never make a Bourbon oligarchy out of a Federal Judiciary which lacks a single power of affirm-

<sup>1</sup> *The Federalist*, No. 35.

<sup>2</sup> Senator La Follette's phrase; Senate Document, p. 13.

ative enslavement. But you can make any sort of a Monster, suited to the appetite of the ruling passion, out of a Legislature which is supreme above all things and all men. "The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of Government, a real despotism," warned Washington's Farewell Address. In the last resort, such a despotism as we discuss, would leave Congress with unlimited powers. "This would be to do away with the great main principle of our written Constitution," declares Vice-President Coolidge,<sup>1</sup> "which regards the people as sovereign and the Government as their agent, and would tend to make the Legislative body sovereign and the people its subjects. It would, to an extent substitute for the will of the people, definitely and permanently expressed in their written Constitution, the changing and uncertain will of Congress. That would radically alter our form of Government and take from it, its chief guarantee of freedom." Indeed, it should be accepted by the American people as an unwavering principle, that "to accumulate in a single body all the most important prerogatives of sovereignty is to

<sup>1</sup> Address at 1922 Convention of American Bar Association, San Francisco.

entail upon our posterity one of the most execrable forms of Government that human infatuation ever contrived."<sup>1</sup> The tremendous French philosopher, Montesquieu, confirmed this sentiment: "Were the power of judging joined with the Legislative, the life and liberty of the subject would be exposed to arbitrary control, for the JUDGE would then be the LEGISLATOR."<sup>2</sup>

The extent to which the Judiciary can permanently usurp Legislative power is limited at most—as any candid analyst of the Constitution must concede. But the extent to which the Legislature can usurp Judicial power—as indicated in the particular proposition we discuss—is utterly without any limits whatsoever. Therefore, even if the former evil shall exist in any degree, we are wise to choose the lesser of two evils when we make our choice.

The real danger to freedom always was, and always will be, from the usurpations of which this latest doctrine of Nullification is typical. Let the authors of *The Federalist* discuss this proposition in their own language—and let it be remembered that truth is constant in all ages.

"In a representative Republic, where the Execu-

<sup>1</sup> *The Federalist*, No. 22.

<sup>2</sup> Quoted in *The Federalist*, No. 47.

tive magistracy is carefully limited, both in the extent and the duration of its power; and where the Legislative power is exercised by an assembly which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength, and which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

“The Legislative department derives a superiority in our governments from many circumstances. Its Constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not infrequently a question of real nicety in Legislative bodies, whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the Executive power being restrained within a narrower compass, and being more simple in its nature, and the Judiciary being described by landmarks still less uncertain, projects of usurpation by either of

these departments would immediately betray and defeat themselves. Nor is this all: as the Legislative department alone has access to the pockets of the people, and has in some Constitutions full discretion, and in all a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependency is thus created in the latter, which gives still greater facility to encroachments of the former.”<sup>1</sup>

Could the menace be more plainly or more sensibly stated? Even under Constitutional conditions as they exist to-day—with the full authority of the Judiciary unimpaired—the fake notion that the only “democracy” in the American form of Government is in the Congress frequently takes possession not only of unthinking people, but of the Congress itself. Again, listen to *The Federalist*<sup>2</sup>:

“The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any quarter; as if the exercise of its rights, by either the Executive or the Judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments;

<sup>1</sup> No. 48.

<sup>2</sup> No. 71.

and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the Government to maintain the balance of the Constitution."

It is unnecessary to amplify these arguments. Their conclusions are irrefutable. "The Legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex," said *The Federalist*<sup>1</sup> more than a century ago. Against this trend, inimical to liberty, the Constitution undertook to erect barriers that should protect America against an ELECTIVE DESPOTISM. Time has not shunted the trend nor depreciated the importance of the barriers. If we, of to-day, are called to contemplate any dangers from encroachments of one department upon another, let it be clearly seen that the inherent capacity for encroachment resident in the Judiciary is as nothing compared with the inherent capacity for encroachment resident in the Legislature; and if, to curb the former—admitting that there have been occasions when the Judiciary has trespassed—we invite the latter, we have, at most, but chosen the "fire" in preference to the "frying pan."

<sup>1</sup> No. 48.

III. But, it is next urged by these modern Nullificationists, that, under existing circumstances, since the Judiciary can veto the Constitutionality of an Act of Congress, the Judiciary is elevated above Congress and "the actual ruler of the American people is the Supreme Court."<sup>1</sup> This is a subtle delusion. When the Judiciary vetoes an unconstitutional Act of Congress, it merely commands that Congress, as well as itself, shall be subordinate to the Constitution as ordained, or amended, by the people. It does not place itself above Congress. It merely places the Constitution above both. It merely insists that "the actual ruler of the American people" shall be the Constitution, and, therefore, the people themselves. The Nullificationists propose to substitute an ELECTIVE DESPOTISM in which "the actual ruler of the American people" shall be an unchecked Legislature.

Here, again, *The Federalist*<sup>2</sup> disposes of this latest argument against the Judiciary, as patently as though it were written this very year:

"Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an

<sup>1</sup> Senator La Follette's phrase, Senate Document, p. 2.

<sup>2</sup> No. 78.

imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the ground on which it rests cannot be unacceptable.

"There is no position which depends on clearer principles than that every act of a delegated authority contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they are forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not other-

wise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the Courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

“Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by

the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental."

IV. This brings us to the notion, advanced by modern Nullificationists, that the Constitution never intended to allow the Supreme Court to pass upon the Constitutionality of an Act of Congress, and, therefore, that the Court "has secured this power by usurpation."<sup>1</sup> This point turns entirely upon a correct reading of history. Modern opinions cannot possibly be as instructive as the opinions of men who sat in the Convention which framed the Constitution, the men who lead in disclosing its purposes to the people at the time they voted its validation, and the men who, still in fresh contact with these other authoritative sources of information and inspiration, set the machinery of the Constitution in motion. Almost with one voice, they deny this resurrected pretension that the Constitution intended to leave Congress supreme in determining the Constitutionality of its own acts.

We have already listened to testimony, on this score, from *The Federalist*—than which there could no more authentic historical reference in a matter of this particular import. Repetition seems unnecessary. "In framing a Government which is to

<sup>1</sup> Senator LaFollette's phrase, *Senate Document*, p. 3.

be administered by men over men, the great difficulty lies in this: you must first enable the Government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on Government; but experience has taught mankind the necessity of auxiliary precautions."<sup>1</sup> That the chief among these "auxiliary precautions" is the Supreme Court, in its relation to unconstitutional acts, is demonstrated by repeated *Federalists* proofs, and confirmed by an unbroken line of Constitutional decisions from that day down to this.

Patrick Henry, though hostile to the Constitution, said in the Virginia Convention: "I take it as the highest emconium on this country that the Acts of the Legislature, if unconstitutional, are liable to be opposed by the Judiciary. . . . The Judiciary are the sole protection against a tyrannical execution of the Laws."

Governor John Hancock, in an address to the Massachusetts Legislature<sup>2</sup> declared: "Our persons and possessions are governed by standing and known Laws, and secured by a Constitution formed by ourselves. This Constitution is a Law to the

<sup>1</sup> *The Federalist*, No. 51.

<sup>2</sup> June 3, 1790.

Legislative authority itself, and lest the pride of office or the hand of lawless power should rob the people of their Constitutional security, a proper balance is provided in the Judicial Departments.” This is important testimony. These modern Nullificationists love to pretend that they can find credentials in the Declaration of Independence. The first signature upon the Declaration was that of John Hancock. And here is Hancock not only officially proclaiming that the Judiciary is a Constitutional check against the Legislature, but also epitomizing the reasons why this doctrine is an absolute American essentiality. The Declaration itself complained that the British King “has combined with others to subject us to a jurisdiction foreign to our Constitution”; these modern Nullificationists would set up a “jurisdiction” just as “foreign to our Constitution” when they make an unrestricted Congress supremely sovereign over the destinies of the Republic. The Declaration said, among other things, that a “British King has obstructed the administration of justice”; yet, in the name of the Declaration—borrowing the livery of Heaven to serve the Devil in—these modern Nullificationists would “obstruct the administration of justice” by reducing it, in Constitutional affairs, to the basis of a biennial political referen-

dum! George III never thought of a more perverted idea in his whole crazy life! "We have warned them ('our British brethren') from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us," reads the Declaration: and, at this late day, modern Nullificationists invoke the Declaration to justify modern Legislatures in a modern effort "to extend an unwarrantable jurisdiction over us" in a lethal fashion which would emasculate the entire theory of American Constitutional affairs! *Mirabile dictu!*

The Kentucky and Virginia Resolutions of 1798-99 were, of course, doctrines of nullification to the extent that they declared the rights of the States to make their own Constitutional interpretations; but they were not a proclamation or endorsement of the view that the Supreme Court lacked Constitutional jurisdiction over the Acts of Congress. On the contrary, John Breckenridge, in the Kentucky Legislature, leading the 1798 contest for these Resolutions, denied emphatically that Congress were "the sole Judges of the Constitutionality of all Acts done by them." Jefferson and Madison sponsored these same resolutions in Virginia. Yet as late as 1798, Jefferson admitted the jurisdiction of the Court; and Madison, who collaborated with Hamilton in the authorship of *The Federalist*, de-

nied thirty years later, when his Resolutions were being cited in support of a Nullification movement, that they constituted or implied any denial of the supremacy of the Judiciary.<sup>1</sup> As for Jefferson, regardless of what he ultimately said and did in keeping with his easy accommodation to political expediency, he declared, following his election to the Presidency,<sup>2</sup> that the Constitution must be administered "according to the safe and honest meaning contemplated by the plain understanding of the people at the time of its adoption, a meaning to be found in the explanations of those who advocated, not those who opposed it; THESE EXPLANATIONS ARE PRESERVED IN THE PUBLICATIONS OF THE TIME."<sup>3</sup> What was the leading Constitutional publication of the time? *The Federalist*. Who was the Constitution's leading advocate? Alexander Hamilton. What did Hamilton say upon this subject in *The Federalist*? Read his unequivocal, unmistakable words<sup>4</sup>:

"The complete independence of the Courts of

<sup>1</sup> *The Supreme Court in United States History*, by Charles Warren, i, 260.

<sup>2</sup> Jefferson's reply to the congratulatory address of the Rhode Island Legislature, soliciting his views on the Constitution.

<sup>3</sup> *Elliott's Debates*, iv, 446.

<sup>4</sup> *The Federalist*, No. 78.

justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of Courts of justice, WHOSE DUTY IT MUST BE TO DECLARE ALL ACTS CONTRARY TO THE MANIFEST TENOR OF THE CONSTITUTION VOID. WITHOUT THIS, ALL THE RESERVATIONS OF PARTICULAR RIGHTS OR PRIVILEGES WOULD AMOUNT TO NOTHING."

Is there any doubt what Hamilton would say or do, if he were here to-day? No more than that these modern Nullificationists cannot muster a single respectable supporter out of the history of those times, to vindicate their perversion of the spirit and the purpose of the Constitution.<sup>1</sup>

V. It is said, in the bill of particulars filed by these new Nullificationists, that the "isolation" of the Supreme Court has resulted in acts that are

<sup>1</sup> An excellent discussion of this phase of the subject is an article entitled "The Constitution Is The Higher Law," by Judge Preston A. Shinn of Pawhuska, Oklahoma, read into the *Congressional Record*, 67th Congress, 2d Session, and later printed as Senate Document No. 234.

“wholly inconsistent with popular Government.”<sup>1</sup> It is idle to discuss this indictment in the light of various isolated decisions which, at the moment, have dissented from public expectation. The mere fact that a decision is contemporaneously unpopular bears no relationship to its Constitutional virtue; neither does it reflect upon the integrity of the Court. Those who are inclined most vehemently to complain at one moment, usually live to see the day when, at some other moment, they wholeheartedly applaud. Thus the great South which, originally, was the chief critic of the Court’s “usurpation” in decisions amplifying Federal authority at the expense of State sovereignty, turned to the same Court in Reconstruction Days and gratefully gained protection from it against an improper exercise of this same amplified Federal authority under the post-bellum Fifteenth Amendment.<sup>2</sup> Thus, too, when Labor Unions were shocked in 1908 when the Court found that a Labor boycott violated the Sherman Act<sup>3</sup> and proclaimed it an evi-

<sup>1</sup> Senator LaFollette’s phrase; *Senate Document*, p. 14.

<sup>2</sup> Chief Justice Waite said, in *U. S. v. Reese*, 92 U. S., 214: “Congress is supreme within its sphere, but the Courts, when called upon in due course of legal proceedings, must annul its encroachments upon the reserved powers of the States and the people.”

<sup>3</sup> *Loewe v. Lawlor*, 208 U. S., 274.

dence of the servility of the Bench to "Big Business," they totally forgot how equally shocked "Big Business" had been when the same Court, in 1897, found that "railroad pools" were illegal under the same Act.<sup>1</sup> In other words, even though a large sector of the Nation be disappointed in some particular Court decision—and even admitting, for the sake of the argument, that these decisions occasionally are wrong—the fact remains that this condition is no reflection on the Court or the Constitution or the American theory of Government. It is merely proof that no human machinery can be infallible; and it ought to serve principally as an emphasis, by comparison, upon the rare record of the Court for being right in a vast preponderance of its conclusions. "The supposition of universal venality in human nature is little less an error in political reasoning than the supposition of universal rectitude. The institution of delegated powers implies that there is a portion of virtue and honor among mankind which may be a reasonable foundation of confidence; and experience justifies the theory."<sup>2</sup>

But if these modern Nullificationists propose to summon the extremes of contemplation to bolster

<sup>1</sup> U. S. v. Trans-Missouri Freight Ass'n., 166 U. S., 290.

<sup>2</sup> *The Federalist*, No. 78.

their charge that the existing system invites results that are "wholly inconsistent with popular Government," what will they say of the extremes, "wholly inconsistent with popular Government" which would be abhorrently invited by a recourse to the expedient which they recommend as a substitute?

Suppose Congress were clothed with power to settle the Constitutionality of its own Acts. If, in the heat and passion of a political canvass, an ultra-radical Congress were elected—elected, perhaps, by a minority of votes, thanks to a division of the electorate among several formidable parties—it could, if it pleased, vote the unrequited confiscation of private property. And then, though the Constitution expressly proscribes any such tyranny, it could declare its own Act to be Constitutional—and no Supreme Court could say it nay!

Suppose, on the other hand, that, through a cunning manipulation of political agencies, a grimly reactionary Congress were to be elected—and let it not be forgotten that it is a favorite complaint among "progressives" that this sort of Bourbon control is a too constant political phenomenon—it could, if it pleased, vote the conscription of Labor; it could invade the whole calendar of the

<sup>1</sup> The successful candidates in the election of 1912 were almost all minority representatives.

Bill of Rights and make a travesty of Constitutional freedom. And then, though the Constitution was expressly ordained to prevent such despotism, it could declare its own Acts to be Constitutional—and no Supreme Court could say it nay!

In God's name, let it be asked, are such contemplations as these an IMPROVEMENT upon the existing conditions under which we live? Is it for such an ELECTIVE DESPOTISM as this that modern "progressive" thought intends to strive?

Back in the old days the State of Pennsylvania had a "Council of Censors" in 1783 and 1784 to inquire whether the Legislative and Executive branches of Government had exercised other or greater powers than the State Constitution permitted. This Council found many such occasions—even that "the Constitutional trial by jury had been violated."<sup>1</sup> The same thing could, and would, happen again if modern Nullificationists could succeed in leaping past our modern "Council of Censors" in their avid thirst for easier power.

The American Federation of Labor figures prominently among the proponents of this ELECTIVE DESPOTISM. Struggling toward broader emancipation for its class, the Federation naturally is

<sup>1</sup> *The Federalist*, No. 48.

hospitable to new ideas which offer promise of advantage. But this is the promise of a cruel mirage. No single group in all America has more to lose than has Labor, from a breach in the Constitution or the Bill of Rights, because the foes, against whom Labor is constantly at war, have such a normal superiority of resources that the Constitution and the Bill of Rights are essential as levellers, to equalize the equities. Labor would toss away its most powerful weapons of defense if it parted with the Constitution and the Bill of Rights, and to leave these safe-guards at the mercy of an ELECTIVE DESPOTISM, is to part with them, as automatic guaranties, forever. It is not difficult to agree with the chief apostate, now advocating nullification, that the Constitution and the Laws should be administered with an eye to their spirit rather than their letter.<sup>1</sup> This rule of judicial conduct is indispensable in an enlightened Nation. But how can the "spirit" be promoted, if the "letter" be killed? A stream can rise no higher than its source.

VI. Consecutive consideration of the new nullification now naturally reaches the proposition that

<sup>1</sup> Interview with Senator La Follette, *Detroit Free Press*, September 24, 1922, quoting *Scripture*: "The spirit giveth life, but the letter killeth."

it is recommended by the British system, under which Parliament is supreme. The specific application attempted is most tortuous, because it becomes necessary for the sophists to liken our own Supreme Court to the British House of Lords,<sup>1</sup> instead of to the British Judiciary—it being the Lords whom the Commons checkmate, since there is no Constitution and no Constitutional Judiciary to intervene at all. We do not find these Nullificationists proposing to make our own House of Representatives dominant over our Senate—a more truthful parallel, if any be attempted at all—because they known this would be a step toward instabilities from which they could glean no profit. It suits their purpose better to mix the metaphor and thus pretend a fake analogy which is as strained as it is crooked. The truth is that there is no analogy at all. The British and the American theories of Government, in certain fundamentals, are incompatible. If we were to propose to borrow one link from the British chain, we should find ourselves required to borrow another, and then another. It is, indeed, curious to find, upon this occasion, that those of our leaders who have made it the professional practice of their whole political lives to be intolerantly and intolerably anti-British, should

<sup>1</sup> LaFollette's Speech, *Senate Document*, p. 16.

suddenly become pro-British in these particular enthusiasms. But we are indebted to them, in this respect, for inviting a conclusive demonstration, on the basis of their own exhibit, that Congressional supremacy over the Constitution would strike down the most sacred of all American guaranties. Listen to this description of the British system by a native authority.<sup>1</sup>

“Parliament can do no wrong. No Judge or higher authority can challenge or deny any decisions, however absurd or monstrous these decisions may be even to the very people who elected those members of Parliament. . . . In Britain there is no written Constitution, and Parliament can do exactly as it pleases. It could pass a Law that every red-headed man should be hanged, and the Courts of Law should have to carry out its bidding. It could pass a Law that every man who now had no property, should receive the property of those who had some, who henceforth would have none. . . . It could even withhold the right of appeal to the Court of Justice, by itself decreeing sentences on any man without judicial aid.”

This is the system inferentially recommended to us as an improvement upon the American structure

<sup>1</sup> *How England is Governed*, by the Right Hon. C. F. G. Masterman, formerly member of the British Cabinet.

of guaranties under which invasion of personal and property rights, though temporarily attempted, can never be permanently achieved! To those who thus would trade their birth-right for a mess of pottage, Hamilton would say<sup>1</sup>: "They seem never to have recollected the danger from Legislative usurpations which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by Executive—or Judicial—usurpations." Of their logic he would say<sup>2</sup>: "It must appear to everyone more like the incoherent dreams of a delirious jealousy, or the misguided exaggerations of a counterfeit zeal, than like the sober apprehensions of genuine patriotism." With the British example particularly in mind, he would observe that the independent Judiciary "in a monarchy is an excellent barrier to the despotism of the prince; in a Republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body."<sup>3</sup> With an eye to the possible extent of such abortion, he would argue that "usurpation may rear its crest in each State, and trample upon the liberties of the people, while the National Government could legally do nothing more than behold its encroachments with indignation and

<sup>1</sup> *The Federalist*, No. 47.

<sup>2</sup> *Ibid.*, No. 46.      <sup>3</sup> *Ibid.*, No. 78.

regret. A successful faction may erect a tyranny on the ruins of Law and Order, while no succor could Constitutionally be afforded by the Union to the friends and supporters of the Government."<sup>1</sup> The new nullification would "mean nothing less than the destruction of our written Constitution," declared a report of the American Bar Association's Committee on American Ideals.<sup>2</sup> "Under such a proposal the American people are guaranteed freedom of speech and action only until some Legislative body declares otherwise." Scarcely a wholesome American doctrine! And—strange paradox! —the last persons who ought, logically, to embrace it, are the very radicals who are pulmotoring it into temporary vitality!

VII. But, it is next protested, if we must lodge the interpretation of the Constitution somewhere, why not trust 500 men in the Congress, instead of nine men upon the Supreme Bench? It would be as reasonable to protest against trial by jury, in our private relations to the Law. Why trust twelve men, instead of a town meeting? Those who rely upon mere numbers for protection should demand —if they would be logical—plebiscites to adjudicate individual invasions of civil and criminal Law,

<sup>1</sup> *The Federalist*, No. 21.

<sup>2</sup> San Francisco Convention, 1922.

at the same time they are demanding a crowd to settle Congressional invasions of Constitutional Law. And then—to crown the absurdity—if it is wise that Congressmen and Senators should decide their own responsibility to the Constitution, when challenged, it is reasonable that defendants, in civil and criminal Law, should sit on their own juries. *The Federalist*,<sup>1</sup> but echoed an elementary Anglo-Saxon maxim, when it said: “No man ought certainly to be a Judge in his own case, or in any cause in respect to which he has the least interest or bias.” If this be not enough in itself, conclusively to dispute the heresy that the Constitution may properly be left to the discretion of those who propose to validate their own invasions of it, a further consideration is urged by this same oracle: “The members of the Legislature will rarely be chosen with a view to those qualifications which fit men for the stations of Judges; and as, on this account, there will be great reason to apprehend all the ill-consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshalled on opposite sides

<sup>1</sup> No. 81.

will be too apt to stifle the voice both of Law and of equity.” Such political jurors would “consider the conformity of the thing proposed, to their immediate interests or aims; the momentary conveniences or inconveniences that would attend its adoption.”<sup>1</sup> They would think more of the next election than of the next generation. But the great, unescapable, fundamental, American need is to “consider the conformity” of questioned Acts to the Constitution, and not to the zeals, frequently transient, of a particular political moment.

Nor is there any more reason to cry out against the settlement of Constitutional questions by Justices, instead of Congressmen, because the Court sometimes decides moot questions by a majority of one,<sup>2</sup> than to cry out against popular elections because Edward Everett was defeated for Governor of Massachusetts in 1840 by a single vote, or because Samuel J. Tilden was defeated for President of the United States in 1876 by a single electoral vote. One contemplation answers the other. It can at least be said that if one Justice out of nine constitutes the majority upon which important decisions sometimes hang, the percentage—one in nine—is infinitely larger than when, for

<sup>1</sup> *The Federalist*, No. 15.

<sup>2</sup> LaFollette’s Speech, *Senate Document*, p. 2.

example, Grover Cleveland was elected President in 1884 through the electoral vote of New York State which he carried by only 1,149 plurality. Thus a super-important issue was decided by 1,149 out of 9,754,351 voters—not one in nine, but one in nine thousand! This is one of the penalties of representative democracy; and it is acceptable chiefly because no substitute for representative democracy—if this paradoxical phrase be permitted—could be less unacceptable.

A requirement of more than a bare majority of the Supreme Court to invalidate an Act of Congress might have formidable arguments to defend it. Certainly none of these insurmountable objections would confront it. But to wipe out the Court entirely—to wipe out the whole nine in order to prevent “majorities of one”—is the philosophy of the “Barnburners” all over again. Constitutional sanity cannot approve.

VIII. A conclusion of this particular study must attend to a variety of incidental arguments.

We find constant references to the “recall of Judges” as a symptom of the popular dissatisfaction with our courses of justice, and as a spiritual justification for this nullification raid. But the “recall of Judges”—always an anomaly, because legal justice can never be a matter of popular vote—

is a waning fad. The Judge who violates his oath can always be impeached; nothing which would not justify his impeachment could justify his removal otherwise. Theodore Roosevelt once may have favored "the recall of judicial decisions," in one of those lapses which are inevitable in the otherwise sound philosophies of a great political leader who dares a multitude of pioneering fields.<sup>1</sup> But he lived to tacitly condemn his own invention, by wholly ignoring it in the maturer years of his superb service for America; and he himself once said—"In not one serious study of American political life will it be possible to omit the immense part played by the Supreme Court in the creation, not merely in the modification, of the great policies through and by means of which the country has moved on to her present position."<sup>2</sup> If it be said that the adoption of the "recall of Judges" by "at least three States of the Union"<sup>3</sup> is a sign of popular dissatisfaction with judicial "usurpations," it may be answered that the absence of this socialistic device in

<sup>1</sup> Oscar Straus, in his book "Under Four Administrations," says: "I believe now, as I believed in 1912, that but for this unfortunate statement regarding judicial decisions, Roosevelt would have been elected President in 1912."

<sup>2</sup> Speech in 1902 at dinner of the Bar in honor of Associate Justice Harlan.

<sup>3</sup> LaFollette's Speech, *Senate Document*, p. 14.

forty-five other State Constitutions, may be as logically argued to reflect a vast majority opinion in America to the contrary. Further; there is not a State in the Union—not even Wisconsin, largely under the influence of the chief Nullificationist of to-day—which has ever written into its Charter, a provision permitting the State Legislature to ignore the State Supreme Court and review the Constitutionality of its own Acts. If the scheme possesses the remotest element of virtue, why has it not been tried out in one of these smaller, laboratory units? Listen again to Hamilton<sup>1</sup>: “If it should be said that defects in the State Constitutions furnish no apology for those which are to be found in the Federal Constitution, I answer, that as the former have never been thought chargeable with inattention to the security of liberty, where the imputations thrown on the latter can be shown to be applicable to them also, the presumption is that they are rather the caviling refinements of a pre-determined opposition than the well-founded inferences of a candid research after truth.”

Another thing! If there is a thoroughly sincere Congressional belief that the Supreme Court should have less authority in the determination of the Constitutionality of legislation, why does Con-

<sup>1</sup> *The Federalist*, No. 61.

gress so frequently avoid the responsibilities, which it already possesses, of closely scrutinizing the Constitutionality of its own Acts before passing them up to the Supreme Court for legal review. Is it not the blunt truth that many a Legislator votes for unconstitutional legislation, knowing it is unconstitutional, but knowing also that the Supreme Court will stop the meditated blow, and preferring that the Court should relieve him of the brunt of criticism from those whom such an ultimate verdict disappoints?<sup>1</sup> With this brand of political timidity in the Legislature, be the degree ever so small—would it be wise to leave the Constitution wholly at the mercy of such self-serving cowardice?

The fact that “the integral history of the coun-

<sup>1</sup> “This is just a little Congressional trick. When the people want any reform, like child-labor regulation, for instance, a Congressman or Senator may win great fame as a reformer by supporting it, laughing up his sleeve all the time. He knows the Supreme Court will declare it unconstitutional. The clearer its unconstitutionality, the safer he is in shouting for it. You, the voters, don’t know it is all a bluff. But he does. . . . This is bad for the country. It is bad for Congress. It makes hypocrites of Congressmen. It makes goats of the public.”—Editorial, *Washington News*, August 28th. This paper, however, uses this exhibit to justify an argument in favor of permitting Congress to settle the Constitutionality of its own Acts, thus to end “artful dodging.”

try would have been little altered, had the Court not possessed or exercised its power to void unconstitutional Acts of Congress,"<sup>1</sup> does not vitiate the presumption, or at least the danger, that the absence of the power might have licensed invasions of Constitutional rights, which the existence of the power discouraged.<sup>2</sup>

All in all, this new proposal in nullification—innocent as it may appear upon the surface—is so thoroughly bad that every loyal Constitutionalist must face it with uncompromising hostility. Under it, the Constitution would become mere flotsam and jetsam on the seas of shifting prejudice. Who wants to argue that any such pitiful uncertainties hold promise of advantage for any citizen of honest purposes and healthy aspirations? Who would really pretend that there is advantage for America in the destruction of those guaranties, under which no dictator, individually or collectively, can Mexicanize the United States, or paraphrase the French Louis with his disdainful proclamation—"The State! It is I!" If Nelson Aldrich or Boies Penrose, in the hey-day of their conser-

<sup>1</sup> *The Supreme Court in United States History*, by Charles Warren, i, 16.

<sup>2</sup> During the Court's first eighty years, only four Federal statutes were held unconstitutional. From 1869 to 1917, thirty-two Acts of Congress were held unconstitutional.

vative power, had proposed this sort of thing, their radical critics would have torn them literally to shreds for daring to propose a treacherous expedient under which "special privilege" would have to control but one Congressional election in order absolutely to dominate the United States and write its uncensored ultimatum into the lives of a defenseless people! If some Bourbon, in the days of the foundation, had stressed such a program as this, making easy a coup to grasp the unchecked reins of Government and over-ride any Constitutional guaranty which might embarrass the designing frenzy of a disloyal cabal, he would have been scourged from the forum as a Tory plotting the recurrence of Kings. The project does not suddenly take on the habiliments of virtue now, simply because it is offered in the name of "the peoples' rights." The leopard does not change its spots. Nullification's authors thunder against the "oligarchy" of the Judiciary; but it is they who propose the real "oligarchy"—an "oligarchy" of politicians who shall find nothing standing between them and autocratic power. Their formula would better serve the impatience of a Commune than the relative equanimity of a representative Republic: tools for Moscow, rather than for Washington.

## Justice and Industry

“Is it too early for politicians to presume on our forgetting that the public good, the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of Government whatever has any other value than as it may be fitted for the attainment of this object?”

—*The Federalist*, No. 45.

‘Why has Government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice, without constraint.’—*The Federalist*, No. 15.

“A power equal to every possible contingency must exist somewhere in the Government.”—*The Federalist*, No. 26.

IF the logical conclusions from the last chapter recommend that we retain all such guaranties of ordered justice as have been erected through more than a century of American wisdom and experience, the logical conclusions from this chapter must recommend a courageous quest for still more of these guaranties in fields where they are wholly and fatally lacking. The time probably has come when Government must recognize the public character of essential industries upon which American

life and livelihood depend. The time has come when candor cannot dodge the truth that there are certain classes of strikes and lockouts which are vastly more of a threat to American homes and the welfare of the bulked American people, than any foreign navies that ever nosed ominously in our direction. The time long since came when Government recognized, so far as Capital is concerned, the public character of certain basic industries and commanded them to abide the mandates of public supervision and control.<sup>1</sup> The time now is here when Government must recognize this same public character so far as Labor is concerned, and order kindred concession to the common weal. The rule must work both ways. Nor, in thus bringing Labor within its scope, is the rule threatening conscription. Labor is quite as free as Capital—more so, usually—to seek other fields of operation if it dislikes the restraints occasioned by the necessary consultation of the public welfare. The American

<sup>1</sup> In *Munn v. Illinois*, 94 U. S., 113, Chief Justice Waite said: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created."

people will not tolerate strikes among municipal policemen, for example, because of the character of their work and because of organized society's unescapable dependence upon the uninterrupted service rendered.<sup>1</sup> Yet, because of this tacit constraint, we do not look upon policemen as conscripts; nor would there be the remotest logic in such a simile. Topsy-turvy nonsense would have reached a lugubrious climax, if the acknowledgment of paramount responsibility to the needs of organized society, could be heralded as an act of degradation. On the contrary, it is a factor of distinction. It should be so rated. And in whatever degree this factor of public responsibility enters any field of Labor—whether in the mining of coal, without which life cannot exist, or in the maintenance of transportation, without which livelihood suspends, or in any other kindred essentiality—an equivalent measure of protection, not for Capital, but for the public, must stand in Law. By the same token, having undertaken thus to create a special Labor classification, with particular reference to public need, and having under-

<sup>1</sup> This axiom was proven once and for all in Boston where a timely display of American spine builded the then Governor of Massachusetts, Calvin Coolidge, into a potential Vice-President of the United States.

taken to shut it off from the usual and traditional recourse to strikes through which Labor is accustomed to attempt to make itself articulate, the same Law must create new agencies—agencies for industrial justice—committed to the plain-spoken proposition that Labor, thus employed, shall have better and surer and safer and swifter means, under auspices of Government, for the complete adjudication of industrial rights and the adequate protection of a saving wage than Labor ever has had in its hazardous reliance upon the arbitrament of force. The achievement of this dual reform, on the broad scales of interstate commerce, will not only serve “the real welfare of the great body of the people,” which is “the supreme object to be pursued,” but also it will ultimately redound to the economic and social advantage of every element of Labor brought within its jurisdiction, with the single possible exception of the well-paid gentlemen who, constituting Labor’s “War College,” may consider the tenure of their jobs somewhat dependent upon perennial rebellion and perpetual militancy.

There was no emphatic Labor union movement, of course, in the days when the Fathers evolved the American system of Government and society. The country consisted chiefly of “the cultivators of

land."<sup>1</sup> These great agrarian interests, fortunately for America, were not strikers, in the modern acceptance of that term. The modern industrial problem, as it perplexes us, was substantially unknown. The Founders, however, were not hemmed by a vision which could see nothing beyond experiences immediately at hand. On the contrary, *The Federalist* itself bespoke the day when agriculture should cease to be "the sole field of labor," when "domestic manufactures are begun by hands not called for by agriculture," and when "in an even more remote stage, the imports may consist in a considerable part of raw materials, which will be wrought into articles for exportation."<sup>2</sup> "A system of Government, meant for duration, ought to contemplate these revolutions," it declared, "and be able to accommodate itself to them." In other words, though it could not speak other than in generalities concerning industrial evolution which it could treat only in prophecy, *The Federalist* did not fail in admonitions which require no stretch of the imagination to make industrially applicable to-day.

Despite this lack of actual contemporary, industrial development, Alexander Hamilton was able to write his famous "Report on Manufactures" in

<sup>1</sup> *The Federalist*, No. 60.

<sup>2</sup> No. 41.

1791—the most profound economic paper ever created by an American statesman—and to lay down the first foundation principles of tariff protection as applied to American industry then not yet created. He was able to forecast and found the modern industrial city of Paterson, New Jersey. He was able to sense the future. But, meanwhile, everything he said and did in relation to the immediate problems of his time, was so clearly the reflection of some great foundation principle and so emphatically the embodiment of some prescient rule of general American conduct, that it requires no particularly bold or presumptuous interpreter to conclude what he would say and do if he were here to-day. Just as he was unwilling to leave the commercial welfare of the United States at the mercy of “combinations, right or wrong, of foreign policy,”<sup>1</sup> he would be no less unwilling to leave it wholly to the vagaries of “combinations, right or wrong, of domestic faction” and just as he refused to absolve Government itself from a fundamental responsibility for the maintenance of successful commerce, he would as readily refuse to absolve Government from a fundamental responsibility for the maintenance of uninterrupted commerce in essential industries. Just as he was always impatient

<sup>1</sup> *The Greatest American*, by A. H. Vandenberg, 199.

of any aim or vision or quest which did not acknowledge the horizon of all America, he would be impatient to-day of any industrial view-point which did not first consult the greatest good of the greatest number and put the essential advantage of mass-America ahead of any and all less comprehensive considerations. Just as he was the pioneering draftsman who charted the original structure for practically every department and necessity of the Government and of his time; just as he himself never hesitated to chance a percentage of failure, if he could see a major advantage to be gleaned from experiment in new directions calculated to involve ultimate utility, it is as sure as any speculation can be that, if Hamilton were here to-day, he would shake the hand of Governor Henry J. Allen of Kansas, congratulate him upon the pioneering courage with which he has blazed new trials for the Kansas Industrial Court Code, and, though he might disagree in administrative particulars, he would applaud the fundamental purpose of the plan to give "The Party of the Third Part," the great American public, its legitimate share of consideration and protection in industrial disputes involving the necessities of life.<sup>1</sup> There

<sup>1</sup> See *The Party of the Third Part*, by Governor Allen. Concluding his argument, pp. 282-283, Governor Allen

can be no sustained denial that this general doctrine squares absolutely with the bases of American Government, and there can be no doubt that a modernized Federalist would sternly urge further strong-footed experiments, particularly under Federal auspices, in the development of industrial peace through adjudicated industrial justice. If it had no other rule to quote, it could rest upon "this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART."<sup>1</sup>

The recent coal and railroad strikes in the United States have initiated a new era of intense public interest in these matters. It can be said

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says: "The rights and welfare of the public must be paramount. No special interest shall dominate America. Class-mindedness and class rule have no place in American Government. Autocracy of Capital and autocracy of Labor must be held sternly in check, alike. There shall be no invisible Government. Labor must be given a square-deal by society. This is not only in justice to Labor, but it is a matter of self-preservation for the general public. A greater measure of employee representation and personal contact between employer and employee must be had. We are still testing whether a Government such as ours can long endure. In order to endure it must be based on the self-evident truths of the Declaration of Independence. This means that the people must always be supreme and that no minority tyranny shall be set up."

<sup>1</sup> *The Federalist*, No. 80.

with the same literal truthfulness to-day as it was set down in *The Federalist* fourteen decades back<sup>1</sup>: "The sober people of America are weary of the fluctuating policy which has directed the public councils." They cured their fluctuations, then, by apportioning the means of Government to the end in view: "the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained."<sup>2</sup> We, to-day, can scarcely hold our modern "public councils" to accountability for "fluctuating policies" unless we, too, shall apportion Governmental means to the industrial ends in view—justice and peace through compulsory adjudication, in essential industries. Except as we profit by our experiences, insist upon making the life of the WHOLE Nation paramount to the selfishness of any PART, make both peace and justice mandatory, and clothe the Government with authority in kind, how can we expect its administration to "be anything else than a success of expedients, temporizing, impotent, disgraceful? How will it be able to avoid a frequent sacrifice of its engagements to immediate necessity? How can it undertake or execute any liberal or enlarged plans of public good?"<sup>3</sup>

<sup>1</sup> No. 44.

<sup>2</sup> *The Federalist*, No. 23.

<sup>3</sup> *Ibid.*, No. 30.

In his strike message to Congress, August 18, 1922, President Harding pronounced this axiom in ordered democracy:

“We must re-assert the doctrine that in this Republic the first obligation and the first allegiance of every citizen, high or low, is to his Government, and to hold that Government to be the just and unchallenged sponsor for public welfare, and the liberty, security and rights of all its citizens.”<sup>1</sup> This doctrine must be accepted into the American consciousness or it is impossible for us to hope for progress toward goals of industrial amity. It is not a new doctrine. *The Federalist*<sup>2</sup> emphasized “the necessity of sacrificing private opinions and partial interests to the public good”; and it demonstrated<sup>3</sup> how a common necessity frequently has compelled “Nations, the most attached to liberty, to resort for repose and security, to institutions which have a tendency to destroy their civil and political rights.” Listen to this: “TO

<sup>1</sup> With specific reference to the railroad strike, President Harding added: “No matter what clouds may gather, no matter what storms may ensue, no matter what hardships may attend or what sacrifices may be necessary, Government by Law must and will be sustained. Wherefore I am resolved to use all the powers of the Government to maintain transportation and sustain the right of men to work.”

<sup>2</sup> No. 37.

<sup>3</sup> *The Federalist*, No. 8.

BE MORE SAFE, THEY AT LENGTH BECOME WILLING TO RUN THE RISK OF BEING LESS FREE!" Freedom, in other words, is to be measured by quality rather than quantity. The abstract privilege of being free, is worthless except as it creates and perpetuates new advantages and new blessings. "The proof of the pudding is in the eating"—to quote a homely bromide. Whenever the use of "freedom" tends to impair these advantages and blessings, it serves but the shadow and neglects the substance of "freedom." The saddest error democracy can make is to disregard the barriers between "liberty" and "license."

The "freedom" of the individual must stop at the dead-line where it threatens to intrude upon the "freedom" of his neighbor. The "freedom" of groups and classes must stop at the dead-line where it threatens to intrude upon the "freedom" of other groups and other classes. And, certainly, the "freedom," either of individuals or of groups and classes, must stop at the dead-line where it threatens to invade the "freedom" and the rights of the mass-majority of American citizens. Nor can the men of industry and the interests of commerce expect to hold themselves immune to these basic contemplations in ordered liberty. When strife in industry becomes a menace to general life

and livelihood, it becomes a menace to ordered freedom; it becomes a challenge to Government—if Government be worthy its name. In such circumstances, it is the business of Government to assert the paramount sovereignty of the general welfare, and to serve it with whatever machinery the necessities of justice and peace may require. Nothing could be more fundamental than this in the scheme and the theory and the purpose of American Government. If, in the operation of this doctrine, some of us seem to give up some theoretic element of "freedom," let us be very sure that we do not gain a practical and advantageous element of "safety" in return therefor, ere we lend ourselves to unthinking opposition. "Men, upon too many occasions, do not give their own understandings fair play; but, yielding to some untoward bias, they entangle themselves in words and confound themselves in subtleties."<sup>1</sup>

Somewhere, in a complex society like ours, there must rest an ultimate, universally accepted trust in a final power of leadership and decision when citizens—individually or in groups—disagree as to their rights and privileges. Otherwise, we are not a Nation, committed to common destiny. We are not a United States. We are the mere guerilla

<sup>1</sup> *The Federalist*, No. 31.

victims of Untied Hates. For more than a century we have all peacefully consented that Courts—the badge of Government—should decide between us when we have disagreed with one another over our rights to property, over our civil and criminal conduct, even over our penal liability to be detained in public jails. No sane man remotely suggests the elimination of Courts—the badge of Government—to decide our arguments and control our personal destinies in all of these functions involving the most sacred elements of life and livelihood. Imagine, if you can, a state of society wherein the disputed title to a man's home should be decided by a vendetta between families! Imagine a state of society wherein the liability for alleged crime should be settled by a duel in which stray bullets mowed down those forced to look impotently on! We outgrew this primitive code centuries ago. Why, then, is it impossible that the "industrial relation"—surely no more vital than all these other prerogatives which we freely submit to judgment by Government—alone should be an exception to the rule of reason?

These parallels are not overdrawn. The "vendetta between families" would not be unlike the vendetta between warring groups, generically called "Capital" and "Labor," each time we submit an

industrial dispute to the arbitrament of "strike" or "lock-out." The "duel" with its "stray bullets" would not be unlike the fruits of violence and the scars of bitterness which trade-mark every one of these reverions to industrial rebellion. Few indeed are these wars which do not cost even their victors vastly more than is their final gain. None, in essential interstate industries, but costs the whole people a vast, dead, and uncompensated loss. Why, then, is it not best for all concerned to hunt a substitute method for settling such controversy? Ninety-nine percent of all "strikes" and "lock-outs" result in ultimate compromise on the basis of some phase of arbitration. Why do we hesitate to insist that this recourse, under Law, shall be first instead of last? Who loses, whether "Labor" or "Capital," when justice is done? Who gains when justice fails? How can we hope for "justice" in the midst of disagreement except as we find an Umpire we can trust? How can we ever hope for a surer, safer Umpire than the Government in a representative democracy? And thus we come to the Harding doctrine again. There is no hope ahead except as we can all consent that Government is "the just and unchallenged sponsor for public welfare, and the liberty, security and rights of all of its citizens."

The pertinence of this doctrine was acknowledged by the Founders of the Nation. In those days, the threat of quarrels was between groups distinguished as States, rather than, as now, between groups distinguished as industrial or labor interests. "In cases where it may be doubtful on which side justice lies," declared *The Federalist*,<sup>1</sup> "what better Umpires could be desired by two violent factions, flying to arms and tearing a State to pieces, than the representatives of confederate States not heated by the local flame? To the impartiality of Judges, they would unite the affection of friends. Happy would it be if such a remedy for its infirmities could be enjoyed by all free Governments; if a project equally effectual could be established for the universal peace of mankind." The analogy is perfect. Can there be much doubt what Hamilton would say and do if he were here to-day?

We must differentiate between essentially private and essentially public industry. The time will never come when either logic or necessity or advisability will recommend any attempts to interject the elements of compulsory industrial arbitration into private business. This would smack of thoroughly un-American paternalism. Only when

<sup>1</sup> No. 43.

the element of the “public welfare” enters the industrial equation—in a broad and commanding way—does the situation challenge public attention. But whenever, industrial disagreements between Capital and Labor enter this latter realm, they fall squarely within the doctrine that the “public welfare” must control, else the theory of the “freedom” of the majority is a farce; and they should be required, by impressively effectual statutes, to submit themselves to the jurisdiction of Industrial Courts. “The Government of the United States has been emphatically termed a Government of Laws and not of men.”<sup>1</sup>

One of the new phrases, created by modern industrial conditions, is “collective bargaining.” It generically describes Labor’s right to deal with Capital as a unit. It is a thoroughly sound and legitimate and American method. It was a realization of the need for “collective bargaining” among the erstwhile American Colonies—the need for one, united, composite, puissant mouth-piece for the Nation, in dealing with other Nations—which really inspired the organization of Govern-

<sup>1</sup> The immortal language of Chief Justice Marshall in *Marbury v. Madison*, paraphrasing the Massachusetts Constitution of 1780—“To the end that this shall be a Government of Laws and not of men.”

ment as we know it. The Founders recognized this political and diplomatic need for "collective bargaining." They argued that lack of it left equity and fair-play at the mercy of superior force regardless of its virtue.<sup>1</sup> The situation, with regard to the needs of modern Labor, is wholly parallel. In the large industrial operations which we discuss, the "employer" invariably is a powerful corporation. The "employee," as an individual, is a relatively impotent person. Only by the process of "collective bargaining"—no matter what the agency therefor—can the "employee" hope to equalize this differential and put himself in position reasonably to cope with an "employer" who is disinclined to do justice. "Collective bargaining" thus becomes an essential to the preservation of the industrial rights of Labor, as it was to the conservation of the political rights of the original United States. A doctrine with such honorable credentials and antecedents should require no contest to support its legitimate acknowledgment in modern, industrial application.

But to pretend that there is the slightest incom-

<sup>1</sup> "It is well known that acknowledgments, explanations and compensations are often accepted as satisfactory from a strong, united Nation, which would be rejected as unsatisfactory if offered by a State or Confederacy of little consideration or power."—*The Federalist*, No. 3.

patibility between legitimate "collective bargaining" and legitimate "compulsory arbitration" in relation to essential industries, is nonsense. When spokesmen for Labor attempt to repel the latter on the theory that it ravishes the former, they either ignore fundamentals or they misconceive the proprieties of power. They ignore fundamentals because the very essence of "compulsory arbitration"<sup>1</sup> is the creation of a lawful forum to which Labor can come, not timidly, not with uncertainties, but with guaranteed assurances that it will meet Capital on a level, and that "employer" and "employee" will stand in even scales before the bar of industrial justice. On the other hand, if it is a misconception of the proprieties of power, which confuses these gentlemen, it should be set down once and for all time that "collective bargaining" does not mean "collective dictation." Nor does it mean "collective immunities"—whether for Labor or for Capital. Nor does it mean "collective impudence." Nor does it mean "collective lawlessness." With all of these latter things "compulsory arbitration" is at war. But, in this war, it is on the side of the public welfare. It is on the

<sup>1</sup> Wherever this phrase henceforth is used, let it be understood to apply strictly and solely to essential industries which involve the public welfare.

side of law and order. It is on the side of adjudicated justice. It is on the side of established right and proven equity. Therefore, it is on the American side, the Constitutional side; and it is the true friend of the true principle of "collective bargaining"—because the greatest danger to this great principle threatens more from those who would abuse it than from those who would ignore and deny it.

No man, no matter what his immediate station or class, can afford dissent to this interpretation, because the dissent which to-day may seem a temporary advantage, may rise up to-morrow to curse and oppress him, in changed circumstance, as a result of the precedent he has encouraged. The use of an unfair power, the denial of an equitable adjudication, the resort to an extra-legal weapon in furtherance of the aspirations of any industrial belligerent, is unenlightened selfishness because, borrowing the language of the street, no man can tell when his "chickens will come home to roost." Thus, for instance, President Harding had to say, in the strike message to which we have referred, that when he learned of the fact that certain railroads had set a fashion for ignoring the mandates of the United States Labor Board, he "could more fairly

appraise the feelings of the strikers," who themselves subsequently ignored the Board, "though they had a remedy without seeking to paralyse interstate commerce." On the other hand, what an awful precedent was set by certain misguided factors among railroad strikers when they revealed their cruelty and contempt for Law by marooning helpless women and children on stalled trains in a western desert, or when they pulled thirty-seven spikes from a track one mile east of Gary, Indiana,<sup>1</sup> and precipitated a wreck which combined murder with sabotage! Is there any question where the "public welfare" is involved in such contemplations as these? And what a precedent, when crazed criminals, prostituting the name of Labor, grimly and ruthlessly staged the atrocities in the Herrin coal fields<sup>2</sup> which brought this verdict from a Grand Jury: "The cruelties of the murders are beyond the power of words to describe; a mob is always cowardly, but the savagery of this mob in its relentless brutality is almost unbelievable; the indignities heaped upon the dead did not end until the bodies were interred in unknown graves." The imagination is numb in the contemplation of what would happen in the event of industrial "reci-

<sup>1</sup> August 20, 1922.

<sup>2</sup> June 22, 1922.

procity" in such circumstances! Yet it is a poor rule which does not work both ways!

The trouble is that we have left "collective bargaining" too much to its own initiative and resources in solving industrial dilemmas. If the Law shall chart the courses which "collective bargaining" must follow, the Law will largely prevent excesses which, now, it can only undertake to punish in retrospect, after all the damage has been done. Men frequently have to be saved from themselves. "A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses, for which they would blush in a private capacity," said *The Federalist*.<sup>1</sup> It is this rule of human nature which causes most of the trouble when uncharted "collective bargaining" is left to its own indiscretions. Let there be no mistake about the fact that in time past, Capital has been guilty of just as startling excesses as Labor, in many of these respects. Whenever these abortive episodes occur, it is invariably a small and unrepresentative minority which is responsible for all the grief. The cause these minorities thus pretend to serve is usually the greatest sufferer of all when the balance sheets

<sup>1</sup> No 15.

of casualty are finally struck. Therefore, when the process of "collective bargaining" is reduced to a legal formula, involving "compulsory arbitration" in essential industries, the best interests of those who demand "collective bargaining" enjoy a new element of stabilizing protection. When industrial justice, in essential industries, is reduced to a code, not only does the public welfare—the paramount concern—receive the consideration which is its due, but the legitimate rights of every person and group, involved in any industrial dispute, are guaranteed the surest and the most honorable and the most equitable protection which human minds can conceive.

One great difficulty which this whole subject of "compulsory arbitration" has constantly faced, lies in the notion that it is aimed at the repression of Labor. Labor naturally looks askance at any proposition which seems to wear this guise. "Men often oppose a thing," said *The Federalist*<sup>1</sup> "merely because they have had no agency in planning it, or because it may have been planned by those whom they dislike." But, why not consider the erection of a new Industrial Jurisprudence, in the light of an affirmative effort to provide Labor itself with a new and a powerful and a sure method

<sup>1</sup> No. 70.

of gaining an acknowledgment of its industrial rights, as related to wages and working conditions? Why not consider it as the creation of a new forum wherein Labor's "Right of Industrial Petition" shall be as sacredly preserved as is its "right of petition," under the Constitution, in regard to affairs of Government and public relations? In this view, is it not a stupendous step forward—just such a step as the Founders of America would have sought to negotiate, if our problem had been theirs?

If we analyse industrial history critically we find that the original, mechanical cause of friction between Capital and Labor is the lack of a fixed means of address and communication and adjustment, in relation to wages and working conditions, between the two. The mere fact that the means have been lacking—originally leaving Labor at Capital's mercy, just as, ultimately, Capital is at Labor's mercy—breeds subconscious class discontent. It is an invisible yoke which is irksome and undemocratic. It suggests helplessness and invites a vague and uneasy quest for emancipation. This has been the seed of trouble. When Labor has sought betterments, it has faced one of two alternatives; (1) to have its petition voluntarily favored by Capital, or (2) to fight to force invol-

untary favor. There has been no legally established protection for this RIGHT OF INDUSTRIAL PETITION—until the experiment was timidly tried through the medium of the Railroad Labor Board. When, therefore, it is proposed to set up the legal machinery which shall guarantee Labor's RIGHT OF INDUSTRIAL PETITION, it is, in reality, the creation of new and vast safeguards for the advantage, rather than for the repression, of Labor. Why should not the erection of a Federal Industrial Judiciary, serving essential interstate industries, be viewed in this light? If it had originally been proposed by Labor itself, for this primary object, is it not probable that the plan would have been thus estimated?<sup>1</sup>

In all his relations to his Government, the man of Labor is protected by inalienable "right of petition" which eternally provides him an unhampered avenue of address to the powers set over him in our institutions. The first Amendment to the

<sup>1</sup> When the author first presented this "Right of Industrial Petition" plan several years ago in *Collier's Weekly* and in Henry Ford's *Dearborn Independent*, one of the most prominent representatives of organized Labor in the country wrote the Editor of *The Independent* in part as follows: "Mr. Vandenberg has laid down the chart; please find the ship-builders and the port of safety for the workers to sail to, and you will have done much to make the world safe for industrial democracy."

Constitution of the United States prohibits any abridgment of "the right . . . to petition the Government for a redress of grievances." This is the citizen's assurance of his legal opportunity to present his prayers to duly and legitimately constituted authority. He needs organize no mob to establish his right to be heard. It is a fixed right—acknowledged in the procedure of every Governmental tribunal in the land. It is to be found in the Constitution of every State. This "right of petition" goes back to Magna Charta and King John. It permeates every subsequent charter of liberty. It is the key-note in every Bill of Rights. It is a human answer to human aspirations. It is original to, rather than derivative from, "free speech." As one author puts it: "It forms an indispensable part of the liberty enjoyed by every Anglo-Saxon." Denial of the "right of petition" has caused more than one political revolution. From 1835 to 1844, Congressional friends of slavery sought to deny the "right of petition" to northern abolitionists. They thereby forced a phase of the issue which was bound to overwhelm them. Henry Clay, himself friendly to slavery, appreciated this situation and pleaded that the "right of petition" be not ignored. "The servants of the people," said he, "should examine, deliber-

ate and decide either to grant or refuse the prayer of a petition and to give the reason for the decision. This would carry conviction to every mind, satisfy the petitioners, and have the best effect in putting an end to the agitation of the public mind upon the subject." The "right of petition" is inherent in practical democracy—doubly so in representative republicanism. To remove it would be to establish a popular cloture which would breed, first irritation, then protest, and finally revolt. Why should we expect any different human process when there is no guaranteed "right of petition" in industrial affairs? And if the **RIGHT OF INDUSTRIAL PETITION**—analogous to the right of Governmental petition—shall be established by Law, why should not the basic cause of irritation between Capital and Labor disappear; with it, the necessity or excuse for protest; and, finally, the revolt—which may be a strike on the one hand, or a lock-out on the other? Our troubles started back in the beginning of things—at the point where Labor found itself devoid of any means to secure "redress of grievances" except such means as it could itself devise. Defensive unions were as logical as that two and two make four: then strikes by these unions were as logical as that four and four make eight. There was no

other way for Labor to COMMAND attention to its industrial petitions for what the Constitution calls "redress of grievances." The great lack, from Labor's view-point, was a fixed and legal protection for the **RIGHT OF INDUSTRIAL PETITION**. If, now, we propose to supply this century-old omission, and to erect Federal forums for the compulsory adjudication of these industrial grievances, and to protect the **RIGHT OF INDUSTRIAL PETITION**, why is it not one more great step forward in the perfection of a better functioning representative democracy? Why, above all things, should it be considered inimical to Labor?

Labor can never be asked to yield its right to strike until some other and better and surer process is provided to guarantee legitimate attention to this **RIGHT OF INDUSTRIAL PETITION**. But when the substitute is once created, Labor should be the first to embrace it because, taken as a whole, the strike is not providing an economical or as effectual weapon. It is losing as much, if not more, than it gains—particularly in industries affecting the public welfare. From 1916 to 1921 inclusive, according to Government statistics, there were 10,254 strikes in the United States. This is the score which indicates the nature of their

conclusions: won by employers, 3,515; won by employees, 3,112; compromised, 3,627. What could more eloquently demonstrate the futility of industrial rebellion? The science of life insurance has taught us that mortality tables are a safe criterion by which to measure expectancy. What is the lesson of the mortality tables of strikes? That those engaged therein, whether on one side or the other of the equation, have just one chance in three of victory. In other words, again borrowing the language of the street, the average strike, at best, is only a "three-to-one bet." If the good judgment of Americans does not revolt against acceptance of such one-sided chance, the sporting sense should hesitate to embrace such an unequal speculation.

These 10,254 strikes cost a total of 264,485 lost days of work. The computation of wages lost by Labor would be tremendous, and, in all human probability, would more than counter-balance all the incidental gains in the 3,112 strikes which Labor won. The computation of profits lost by Capital would be equally tremendous—and, in all human probability, would more than counter-balance all the savings in the 3,515 strikes which Capital won. Meanwhile, of course, the computation of wholly uncompensated public losses

incidental to these strikes would complete a sad balance sheet. Why, in the face of such exhibits, should any advocate support the doctrine that strikes are a paramount advantage to anybody—least of all to Labor? Why should not Labor be among the first factors to demand of organized society that it find and create a better agency for protecting Labor's **RIGHT OF INDUSTRIAL PETITION**, for establishing industrial equity, for guaranteeing industrial justice, and, thus, for promoting industrial peace?

A report issued by the Pennsylvania Bureau of Mediation and Arbitration puts the wage loss from strikes in that State during the first half of 1922 at \$117,546,466, of which the sum of \$114,562,914 fell on striking miners. The New York Herald (August 31, 1922) presented a careful estimate indicating that the most recent strike in anthracite and bituminous coal fields will have cost the staggering total of \$1,190,000,000 ere it is wholly liquidated. Where is the compensation for this appalling loss? Where is Labor's compensation for \$450,000,000 in lost wages? Where is the public's compensation for the additional \$400,000,-000 in its twelve-months' coal bill, caused by the economic effects of such disturbance? Why should an effort to provide a better, a surer, a peaceful, a

comparatively costless means for establishing industrial justice be spurned as a device favorable only to Capital? Capital lost but \$40,000,000 in profits, according to this same coal strike computation. Capital has less at stake, in a program to abjure strikes, than either Labor or the public. Capital, as a matter of fact, succeeds, sooner or later, in passing its losses on to the ultimate consumer. But what Labor loses, it loses; and what the public loses, it loses, once and for all. Why should not Labor and the public together be the two great forces seeking this new emancipation from the thraldom of industrial rebellion. Who won the railroad strike? Nobody! Every element connected with it lost, and lost heavily. Alexander Hamilton was the greatest economist of his time. If he had not insisted that America be organized on a basis of sound economic sense, America could never have survived the initial years of her great experiment. Is there any doubt what Hamilton's advice would be to-day, pertaining to this greatest of all elements of waste cursing the country internally? The strike method has failed miserably. Like a stone hatchet in the watch factory, it has no place in the finely ordered mechanism of present-day sociology and economics. It is a weapon of crude force—useful in a day when

desperate defensive war-fare was needed as a last resort and there was no sensitive public conscience in the matter of industrial relations. In this day, when the public and its servants are keenly alive to the needs and rightful deserts of Labor—when the weapon kills helpless babies, invalids, and other innocent people and constitutes a real menace against the whole public—there is a better way. It points toward a better arranged freedom and the acceptance in greater measure of our great instrumentalities of American justice and fair-play.<sup>1</sup> The Founders faced the difficulty of composing differences arising between jealous States, rather than jealous industrial factions, and to these frictions they applied this logic.<sup>2</sup> “The pride of States, as well as of men, naturally disposes them to justify all their actions, and oppose their acknowledging, correcting or repairing their errors and offenses. The national Government, in such cases, will not be affected by this pride, but will proceed with moderation and candour to consider and decide on the means most proper to extricate them from the difficulties which threaten them.” The same premise and the same conclusions recommend the national Government, func-

<sup>1</sup> Elmer T. Peterson writing in *The Outlook*.

<sup>2</sup> *The Federalist*, No. 3.

tioning through fixed tribunals; as the arbiter in industrial ructions.

Many American newspapers have frequently applauded the International Typographical Union as a type of worthy and useful Labor organization in all respects save those which have undertaken to limit production. How has this "I. T. U." chiefly succeeded in making the vast gains for itself which it has recorded in years gone by? Through strikes? Oh, no! First, by legitimate collective bargaining; second, by hard and fast contracts to arbitrate disputes; third, by the sacred execution of contracts resulting either from bargaining or from arbitration. There have been exceptions, of course, to this rule: but, in the main, they have but served to emphasise the rule itself. There has been no loose chatter about "slavery" or "conscription" because this branch of Labor has seen fit to acknowledge the propriety of settling industrial arguments by judicial interpositions. On the contrary, there has been a very general acknowledgment of vast advantage to this branch of Labor as the direct and specific result of these policies. But in 1921, this union launched upon a strike program to force the 44-hour work week in job printing shops. Whether the strike was justified, on the grounds of broken promises as

claimed, is beside the point that is to be here made. Whether it was theoretically won or lost also is beside the point. The point is that up to August 20, 1922, the strike cost the union in actual disbursements a total of \$10,674,926.73<sup>1</sup> and President McPartland himself declared—"It will be seen that the cost of a strike financed as this has been, makes it almost prohibitive." If a computation of lost wages be added to the cost, the figures would give pause to the most belligerent of radicals. It is not a rash thing to venture the assertion that when the "I. T. U." finally balances its books, it will find that its conciliation policies have brought it infinitely greater advantage than its strike policies; and so long as employers and employees have the mutual disposition to be fair, this must always be the result. While this is an exhibit out of so-called private industry—and, therefore, outside the jurisdiction of the proposals which we are particularly stressing—it is pertinent to the main argument that the "right of strike" is not half as essential to Labor as is the effectual creation of other media through which to peacefully protect and preserve the "right of petition."

The whole question of unionism seeps into this situation and muddies the waters. But it does not

<sup>1</sup> *Typographical Journal*, September, 1922.

belong, as a controlling factor, in the discussion of new means to guarantee industrial justice, and then to outlaw strikes and lock-outs in essential industries. The very essence of Government-controlled justice bespeaks equality before the Law. The union, wherever it exists, would be entitled to its unprejudiced day in an industrial Court. It would be the logical attorney for groups which it might represent in these processes of collective bargaining. In fact, the Law under which the United States Labor Board was organized specifically recognizes the utility of unions for this purpose. On the other hand, if the Constitution means anything at all in relation to industrial freedom, and if equality before the Law is anything more than a mockery, non-union Labor would get and should receive a similar acknowledgment of rights and privileges as free-born American citizens. Upon this proposition there can be no American compromise. It is fundamental that an American workingman has the right to conduct his wage negotiations through the spokesmanship of a Labor union if such be his desire; but it is no less fundamental that an American workingman has the right to accept non-union employment when and where it may be offered under terms and conditions individually acceptable to his own

judgment. "Liberty is gone in America when anybody is denied by anybody the right to work and live by that work," President Harding declared in a speech on Independence Day at Marion, Ohio.<sup>1</sup> "When a man in this country is not permitted to engage in lawful toil, whether he belongs to a union or not, with full protection and without interruption, the death knell to liberty will be sounded and anarchy will supersede organized Government," declared Attorney-General Daugherty in supporting the plea of the Department of Justice for an injunction in the railroad strike.<sup>2</sup> There are sentences which would feature the very preamble of a new Federalist. They go to the roots of true American equality. They would emblazon the fundamental doctrines of a new industrial judicature. All Labor—union or non-union—would find equal and unprejudiced sanctuary in such a Governmental forum as this discussion envisions. The "open shop" and the "closed shop" would depend upon their merits, not upon their belligerent resources, for their power and their authority. President Samuel Gompers of The American Federation of Labor, in his 1922 Labor Day address, pleaded against such a

<sup>1</sup> July 4, 1922.

<sup>2</sup> Chicago, September 1, 1922, before Judge Wilkerson.

forum, saying that "American citizenship must more firmly resolve to stand by the Declaration of Independence and the Constitutional guaranties of the Republic." What principle, pray, so completely dominates the Declaration and the Constitution as the great, basic, American doctrine of equality? And where or how could equality be more faithfully served than in just such a forum as the country's enlightened common sense is rapidly coming to approve?

President Gompers insists that "the right to cease work at will is one of a small group of rights upon which our whole civilization and our whole future progress must rest."<sup>1</sup> To a degree, he is correct—though no more correct than he would be if he were to enunciate the equally fundamental doctrine that "the right to continue to work at will" is likewise basic to civilization and progress. To recognize the former "right" on behalf of organized Labor, but to deny the latter right to unorganized Labor, is an inconsistency that smacks of special pleading. But be this as it may, is there not still another axiom in democracy which underlies both of the others? Must it not always be a cardinal doctrine that no "rights" inure to any

<sup>1</sup> Signed statement attacking the theory of all Labor Courts, Chicago *Herald & Examiner*, September 17, 1922.

individual or to any group which ever can transcend the mass "rights" of organized society as a whole? Must it not always be true, we repeat, as declared by *The Federalist*<sup>1</sup> that the "peace of the WHOLE ought not to be left at the disposal of a PART"? In other words, must there not be industrial situations in which "the public welfare" is paramount?

This issue was framed in direct language in a debate between Mr. Gompers and Governor Allen of Kansas in Carnegie Hall, New York City, May 28, 1920. In the course of the debate, Allen put this question to Gompers: "When a dispute between Capital and Labor brings on a strike affecting the production or distribution of the necessities of life, thus threatening the public peace and impairing the public health, has the public any rights in such a controversy, or is it a private war between Capital and Labor?" There you have it: when a strike threatens the public welfare, is it a matter of public concern, or is it a private war? If the public is threatened, in life and livelihood, is the public entitled to protect itself, or is it called upon to commit uncomplaining suicide? Mr. Gompers did not answer the question that night. He issued a statement ten days later

<sup>1</sup> No. 80.

which purported to be an answer: "Labor has no desire to cause inconvenience to the public, of which it is a part. But the public has no rights which are superior to the toilers' right to live and his right to defend himself against oppression." Governor Allen answered his own question simply by citing the American Constitution, which "makes the rights of the public paramount to every special interest."<sup>1</sup>

Allen's must have been the correct answer, regardless of the controversial detail in which he may have worked it out in Kansas. Even on the basis of defending "toilers against oppression," is it not a fact that a great, national strike in an essential industry—like transportation, for example—threatens millions of other "toilers" in other industries which may have to suspend in the event of transportation paralysis? How about these "toilers' right to live?" They would outnumber railroad strikers, ten to one. Their interest, in such a crisis, is absolutely hostile to the special interest of the "toilers" on strike. Their interest is joined with the interest of the general welfare. In other words, Mr. Gompers cannot draw the line of battle between "toilers" on one

<sup>1</sup> *The Party of The Third Part*, by Gov. Henry J. Allen, 109.

hand, and "the public" on the other. The "public," in such a crisis, will number vastly more "toilers" than are enrolled beneath the banners of industrial insurrection.

It is impossible, by any process of logic, to escape the conclusion that there are industrial occasions wherein the public welfare is paramount, and that Labor does not yield any of its legitimate American rights when it acknowledges the truth and accepts the limitations of citizenship in respect thereto. Nor is it possible to sustain the proposition that Labor submits to some form of involuntary servitude the moment it trades its strike right for the right to have its problems judicially reviewed. Organized Labor has answered this fallacy for itself by its repeated and voluntary negotiation of contracts for arbitration and mediation. The International Typographical Union and the American Newspaper Publishers Association have dwelt together in harmony for years under exactly such contracts; and the report of the Committee on Officers Reports, in the annual convention of the International Photo-Engravers Union of North America<sup>1</sup> said—"As an organization we are committed to the principle of conciliation and arbitration." Does this principle become one of

<sup>1</sup> Chicago, August 21, 1922.

“servitude” the moment it is proclaimed as the mandatory rule which must govern in situations where the public welfare is the paramount concern? It most certainly does not. A deeper principle, one of social morality, controls. President Cleveland said he would deliver a postal card if he had to do it by using the entire army. President Roosevelt said that he would do anything for Labor except what was wrong. Washington’s Farewell Address declared: “Liberty is indeed little else than a name, where the Government is too feeble to withstand the enterprise of faction, to confine each member of the society within the limits prescribed by the Laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property.”

In the early days of the Republic—the days when many of the wisest statesmen who ever functioned for a people, were concentrating their wisdom upon the problems of effectual Government among freemen—there was constant friction between groups of citizens inspired by conflicting purposes. “There are causes of hostility,” observed *The Federalist*<sup>1</sup> “which take their origin entirely in private passions; in the attachments, enmities, interests, hopes, and fears of leading

<sup>1</sup> No. 6.

individuals in the communities of which they are members. Men of this class, whether the favourites of a king or of a people, have in too many instances abused the confidence they possessed; and assuming the pretext of some public motive, have not scrupled to sacrifice the national tranquillity to personal advantage or personal gratification." Is not this observation specifically applicable to-day? The "conflicting purposes" are different; but the sacrifice of "the national tranquillity" is the same. There have been Captains of Industry and there have been Captains of Labor who, for the sake of a finish fight which has smelled more of venomous antipathies than of profound convictions, have carried on ruthlessly, to the injury of fair-play, to the ravishment of honorable peace, and to the menace of society. If, in the kindred situation as it existed more than a century ago, the Founders recognized that this condition led straight toward crushing fatality, should we neglect the same acknowledgments to-day? "Complaints are everywhere heard," said *The Federalist*: "that our Governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice

<sup>1</sup> No. 10.

and the rights of the minor party, but by the superior force of an interested and over-bearing majority." Is it any less true, to-day, with an eye to persistent and perennial industrial rebellion, that "the public good is disregarded in the conflicts of rival parties?" If the Founders insisted that these unregulated rivalships—then usually between States—must stop, should we be less candid in following their example? "Stability in Government," said *The Federalist*<sup>1</sup> "is essential to national character and to the advantages annexed to it, as well as to that repose and confidence in the minds of the people, which are among the chief blessings of civil society. An irregular and mutable legislation is not more an evil in itself than it is odious to the people; and it may be pronounced with assurance that the people of this country, enlightened as they are with regard to the nature, and interested, as the great body of them are, in the effects of good Government, will never be satisfied till some remedy be applied to the vicissitudes and uncertainties which characterize the State Administrations." To-day's major "vicissitudes and uncertainties" flow from unregulated industrial conflict in essential industries. The people again "will never be satisfied till some remedy

<sup>1</sup> No. 37.

be applied." Is it not obvious that, without some remedy, our constantly intensifying industrial conditions will swing back and forth between temporarily dominant Capital and temporarily dominant Labor—both suffering as often as succeeding—neither ever being able to consolidate a permanent advantage? Is not this a species of shifting tyranny—no less obnoxious because shifting?

Labor itself has vastly more to gain than it has to lose from the establishment of the remedy. Other things being even remotely equal, public opinion will always favor Labor. We have long since out-lived the black days when the exploitation or the repression of Labor was deemed an advantage to anybody. If there still be occasional Bourbons who cling to the ancient view that Labor is not something more than a mere mechanism, they are relics of a discredited age and they are rapidly losing any semblance of lingering authority. The prosperity and the happiness of Labor are as essential to a stable, vigorous America as are the Stars in its Flag. The self-defensive organization of Labor is a progressive movement that is here to stay. Indeed, when organized Labor, as a unit, accepts full responsibility for its acts under the Law, acknowledging obligations co-extensive with its rights and privileges; when it puts as great an

emphasis upon the quality of its work as it does upon the maximum compensation which it can then unanswerably demand; when it demonstrates its own convincing faith in the impregnable righteousness of its cause, by daring any opponent to meet its case, on merit, before an industrial umpire in a court of industrial justice; when it takes this high, American ground, it will be as over-whelmingly popular as it will be absolutely invincible. Those who believe that Labor will be safe in a Court of industrial justice, display an infinitely greater faith in the inherent virtue and righteousness of Labor's cause, than do those who, by opposing all such referenda, confess a doubt that Labor's cause can withstand such scrutiny. The American theory of ordered justice has never yet been other than advantageous to Labor.<sup>1</sup> This newest evolution would be no exception to the rule.

Workingmen's compensation Laws have succeeded in taking most of the uncertainty and oppression and injustice out of vocational acci-

<sup>1</sup> "Employes should remember that the Republic was the first form of Government that gave Labor a chance. The worst year for Labor in the United States was better than the best year for Labor in any other country in the history of the world."—*Back to The Republic*, by Harry F. Atwood, 82.

dents. Standardized recourse to fixed tribunals has guaranteed Labor a "right of petition" in these respects, which has effectually saved Labor from the dubious necessity of fighting for a square-deal. Though these compensation Laws may need further liberalizing in spots, they are so universally acknowledged as a vast, progressive reform, that Labor would battle unyieldingly against their repeal. In other words, experience has demonstrated that Labor gained a greater, permanent advantage when it traded the "right to fight" for the "right to demand justice under the Law," than it ever enjoyed under the old era of free and unlimited controversy. If this result could flow from an ordered regulation of "workingmen's compensation" for accidents, why might it not be equally anticipated from an ordered regulation of "workingmen's compensation" for services rendered? Is there no analogy whatever between the two propositions?

The Kansas Industrial Court Law is, of course, the pioneer in the United States.<sup>1</sup> It has been the subject of heated, partisan controversy all over the land. It has run a turbulent career in the State of its birth—where one outstanding Labor leader has

<sup>1</sup> Passed by a special session of the Kansas Legislature, January 24, 1920.

gone to jail for his refusal to acknowledge the sovereignty of the whole people as expressed in legal statutes. It cannot be the purpose of this book to discuss the relative merit of arguments, pro and con, in relation to the Law's detail. Referring to the Kansas Law and the United States Labor Board—the one compulsory, the other voluntary—President Gompers has said: "Neither one of these outstanding examples of the industrial Court idea has succeeded in preventing strikes; on the contrary, in both cases the utter futility of the whole idea has been completely demonstrated."<sup>1</sup> Governor Allen's testimony, on the other hand, takes the "f" off of "futility" and tosses it back into the dark ages. "The Court of Industrial Relations Law has been upon the statute books less than two years," declares Allen, "and thirty-four causes, involving the wages and working conditions of many thousands of laboring men, have been adjudicated. Of these thirty-four decisions, thirty-three of them have been accepted as just and satisfactory both by the employers and employees. A LARGE MAJORITY OF THE CASES WERE BROUGHT BY THE EMPLOYEES. The only appeal taken in a case which relates to wage awards

<sup>1</sup> Statement in Chicago *Herald & Examiner*, September 3, 1922.

or working conditions . . . is in the Supreme Court awaiting the report of a special commissioner appointed to make a survey of the cost of living. In the meantime the employer is setting aside the additional wages ordered by the Industrial Court and these will be distributed to the laboring men if the Supreme Court upholds the Industrial Court's decision."<sup>1</sup> Again: "Prior to the establishment of the Industrial Court, there had been an average of 13½ strikes a month in the Kansas coal fields, with an average of 141 working days a year for each miner; since the Court was established, the average number of days which each miner was employed has been increased to 256 a year."<sup>2</sup> Would it not seem, from this record, that the basic idea of an ordered industrial justice—whatever may be the detail of its evolution—holds promise for Labor as much as to any other parties to the average industrial equation? "I notice that Samuel Gompers continues to declare that the Kansas Court has failed," writes Allen<sup>3</sup> "because it has not put all the strikers in jail. If Mr. Gompers has read

<sup>1</sup> Statement entitled "Recent Activities of Court" supplemental to Open Letter, September 11, 1922, from Allen to Congressman Homer Hoch.

<sup>2</sup> Gov. Allen's address to American Bankers Association Convention, New York City, October 5, 1922.

<sup>3</sup> Letter to Congressman Hoch.

the Kansas Law he knows that this is a ludicrous argument. It is apparent to any intelligent man who reads it that it is not the purpose of the Law to send men to jail for refusing to work. The Law expressly provides that nothing in it shall be interpreted to deprive a man of his natural right to choose his own employment and to cease it at will. The purpose of the Law is to prevent concerted action which might take the form of a conspiracy to restrict production or to close down an essential industry."

This principle is bound to prevail. The Kansas idea is "adjudication" rather than "arbitration." But the end—ordered and guaranteed justice to all concerned, including the public welfare—is the same in either event. All social progress is a matter of evolution. The original American Constitution was the product of slow, tortuous, compromising evolution. It would be a miracle if the processes of ordered industrial justice could arrive with any less degree of travail. Foreign experiments with arbitration contribute their admonitions. In Australia, for example, the criticism most often heard regarding Australian industrial arbitration Laws, is that they operate too generously for Labor—strange contemplation, in view of American Labor's hostile pre-conceptions on the

subject. One native journal<sup>1</sup> charges that some of the country's greatest industries are suspended because they cannot pay the wages awarded by the Arbitration Court. According to the Melbourne correspondent of a great London newspaper<sup>2</sup> an effect of the system is to make unionism compulsory. Yet here in America the unions have fought every approach to the subject, claiming it to be a veiled assault upon unionism! Here we have, at very least, a demonstration of what fictitious barriers American prejudice has raised against a doctrine which, thus far, has had little or no opportunity to stand inspection upon its merits. It cannot be inherently poisonous to American Labor and be, at the same time, inherently generous to Australian Labor, which occupies a substantially high plane. The trouble in Australia easily may be that the effort at statutory arbitration has been too complete and too rigid. It sometimes actually penalizes Labor, according to this Melbourne correspondent, by prohibiting the voluntary acceptance of lower wages than the Court has decreed, when the maintenance of the appointed task obviously is impossible without lower, and mutually agreeable, costs.

<sup>1</sup> *The Industrial Australian*, as quoted by *The New York Herald*.

<sup>2</sup> *The Times*.

Canada's experience with less drastic arbitration laws, on the other hand, illumines a more inviting path. The Canadian Law bespeaks conciliation rather than conclusive judgments. It seeks no jurisdiction beyond industries essential to public service. It seems to have been aimed essentially at the injection of public influence into disputed equations. Seeking to estop resorts to force, it does not itself embrace the power it undertakes to discourage in others. It does not attempt to take from organized Labor its right to strike. It does not attempt to outlaw the lock-out. But it does procure a breathing space in which common counsels have a chance to prevail; and it does say that before either side precipitates industrial warfare, a full investigation into the merits of the dispute must occur. Its conciliation boards, created by the Minister of Labor, sometimes merely postpone, instead of preventing, civil war; but the records indicate a healthy degree of complete success. In the year ending March 31, 1921, there were 509 applications for conciliation boards; 371 of these were granted, and there were only 32 cases where strikes were not averted or ended. The small minority of failures is poor excuse indeed for ignoring the useful majority of successes. "On the whole," one critic has written, "the industrial

disputes investigation act has been an alleviating influence in Canadian industrial life, and has kept the Dominion freer from troubles of this kind than most countries."<sup>1</sup> No claims are made that the Canadian experiment ushers the millennium; but no doubts are legitimate that it points a stage of useful development toward a dawning day of industrial reason. In a word, both of these foreign exhibits indicate that somewhere in the field of industrial arbitrament—a field thus far but casually explored by hardy pioneers—lies higher ground of common industrial advantage for all who seek just social relations.

In the final analysis, the paramount importance of the public welfare is the thing which commands modern America to order "industrial disarmament" in situations involving life and livelihood for a majority of our whole people. In sustaining the power of Congress over common carriers, the Supreme Court declared in 1917, in the Adamson Law case, that Congress has the Constitutional right to legislate to fix wages and hours of labor "in case of emergency and for the purpose of keeping interstate traffic open and continuous."<sup>2</sup>

<sup>1</sup> W. J. Jeffers of Toronto, writing in *Detroit Saturday Night*.

<sup>2</sup> *Wilson v. New*, 243 U. S., 332.

“Emergency” may exist in times of peace just as desperately as in times of war. It is an “emergency,” of the type indicated, whenever strike or lock-out threatens serious interruption to the continuous operation of essential industries. America has been desperately near to fatal crisis more than once in just such artificial and arbitrary emergencies. As *The Federalist*<sup>1</sup> said of threats to the public welfare—“We owe it to mere casualty, that very serious embarrassments on this subject have been hitherto escaped.” And as *The Federalist*, and the Constitution, and the whole heart-purpose of the Founders of this Government, combined together to urge emancipation for the common, public welfare from “the hazard of events”<sup>2</sup> so it may be set down as unmistakably sure that if the wisdom and the virtue of these other days could be brought into modern consultation, one of the first of these patriotic mandates would demand a fixed system of ordered industrial justice in essential American industries.

It is not difficult to conjure the basic reasoning which Hamilton, if he were here, would apply to the situation. “Nothing is more certain than the indispensable necessity of Government, and it is

<sup>1</sup> No. 42.

<sup>2</sup> *The Federalist*, No. 40.

equally undeniable that whenever and however it is instituted, the people must cede to it some of their natural rights, in order to vest it with requisite powers."<sup>1</sup> Otherwise, the "result is to embarrass the administration, to destroy the energy of the Government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority."<sup>2</sup> Whether this "junto" is Capital or Labor—it can be and has been both—makes no odds when the public welfare is the stake. The greatest good for the greatest number is the only sound American rule. "The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good."<sup>3</sup> This, accurately and specifically, is the situation to-day in relation to essential industries.

<sup>1</sup> *The Federalist*, No. 2.

<sup>2</sup> *Ibid.*, No. 22.

<sup>3</sup> *Ibid.*, No. 22.

"Government is instituted no less for protection of the property, than of the persons, of individuals."<sup>1</sup> Both are at the mercy of industrial civil war. If ordered industrial justice, in essential industries, be substituted, "the interest of all would be the security of all."<sup>2</sup> Then we shall put behind us these "wretched nurseries of unceasing discord."<sup>3</sup> When the issue becomes "unions *v.* the Union" or "capital *v.* the Capitol," there can be but one American choice; and there is but one American method for determining relative rights and wrongs. "The security to society must depend on the care which is taken to confide the trust to proper hands, to make it to their interest to execute it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good."<sup>4</sup>

<sup>1</sup> *The Federalist*, No. 54.

<sup>2</sup> *Ibid.*, No. 60.

<sup>3</sup> *Ibid.*, No. 9.

<sup>4</sup> *Ibid.*, No. 66.

## “This Dangerous Vice”

“Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular Government never finds himself so much alarmed for their character and fate as when he contemplates their propensity to THIS DANGEROUS VICE. He will not fail, therefore, to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular Governments have everywhere perished; as they continue to be the favourite and fruitful topics from which the adversaries to liberty derive their most specious declamations.”—

“By a faction I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”—*The Federalist*, No. 10.

THE Constitution of the United States contemplates a social and political integration which shall no more be broken down by class prejudice

and by racial and religious passion, than by untoward fidelity to any other attachments which make for a sub-divided country that shall be at the mercy of clique or clan. The spirit of the Constitution is at war with the spirit of faction. "THIS DANGEROUS VICE" is the deadliest of all foes to the essence of freedom. Bigotry wears many masks, but none of them can wholly hide the menace that lurks behind. Indeed, the more righteous bigotry's pretense, the more dangerous its fangs. Pope said: "The worst of mad men is a saint run mad." The Bill of Rights is, in effect, the Constitution's Bill of Particulars against "THIS DANGEROUS VICE." Sometimes it is a species of fanaticism which pretends—aye, profoundly believes—that it monopolizes virtue, and is commissioned to the achievement of its aims, regardless of mere man-made Law. Sometimes, it is a species of fidelity to purposes that cannot be reached through Law, because contrary to the theory of Law. Sometimes, it is a species of infatuation which persuades itself that wrongs must be righted by new and extra-legal Crusades. Sometimes, it is that thing which we came to know, in war parlance, as "hyphenated patriotism." Sometimes, it is sedition and anarchy covered by a thin veneer. Sometimes it is sheer selfishness;

sometimes, zealotry; sometimes, ignorance. Perhaps it is unfair to group all degrees of faction together in a single indictment. Obviously, some are worse than others. There is a distinction, in the things we say, between admonition and condemnation. But warning must run against one and all alike. Americans are entitled to be intolerant only of un-Americanism. The only faction, warranted by the spirit of the Constitution, is the faction which insists that the spirit of the Constitution shall remain sacred. The solidarity of the United States can be more definitely threatened by profane faction—dedicated to racial, religious or class vendetta—than by any external enemy in sight. If Hamilton were here today, he would find as many fires burning upon as many altars of faction as there were in the turbulent days when he was interpreting the New Freedom under the Constitution. By the same token, if Hamilton were here to-day, "**THIS DANGEROUS VICE**" would face his uncompromising challenge.

If one word appears oftener than another in *The Federalist*, it is this word "faction." No pains were spared to demonstrate how faction, frequently dedicated to comparatively inconsequential ends in the beginning, has evolved the ruination of other lands and dynasties and Govern-

ments; how mere pin-pricks of factions have historically developed lethal fevers.<sup>1</sup> With solemn reiteration, the disruptive menace of internal faction was urged upon the new Nation, dedicated to unity and to equality before the Law. No greater need for the people was emphasised than "to guard them against those violent and oppressive factions which embitter the blessings of liberty."<sup>2</sup> The typical language of faction was outlawed by Washington in his Farewell Address: "You cannot shield yourselves too much against the jealousies and heart-burnings which spring from mis-representations—they tend to render alien to each other those who ought to be bound together by fraternal affection." Mis-representation is the concomitant of faction. A land of

<sup>1</sup> *The Federalist*, No. 6, reminds us that Pericles, "in compliance with the resentment of a prostitute"—Aspasia—destroyed the city of the Samnians, and, later, "stimulated by private pique," was the primitive author of the famous and fatal Peloponnesian War; that Cardinal Wolsey, "permitting his vanity to spire to the triple crown," precipitated England into war with France; that the "bigotry of one female"—Madame de Maintenon, the "petulance of another"—Duchess of Marlborough, and the "cabals of a third"—Madame de Pompadour, influenced "the policy, fermentations and pacifications of a considerable part of Europe."

<sup>2</sup> *The Federalist*, No. 45.

far-flung hatreds is the inevitable climax when faction takes possession of the National soul. There may remain the shadow, but the substance of a United States, as conceived by the Fathers and dedicated to legitimate personal freedom, is gone if faction ever rides the saddle.

Human nature is the same in every age. The genesis of faction may have been different a century ago: but the generations of to-day are no less exposed to contagions which, though perhaps new in guise, serve the same fatality. The warnings of *The Federalist*<sup>1</sup> read as though penned in 1923:

“The latent causes of faction are sown in the nature of men; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment of different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their

<sup>1</sup> No. 10.

common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts."

Faction, in the modern sense, applies to any coalition for the invasion or the embarrassment of the Constitutional rights of others, or for the subversion of the Constitution itself. Faction enters the industrial equation and arrays classes, against each other, which can enjoy no true progress and prosperity except in mutuality of effort and through honest co-operation. Faction enters the cloisters of religion and puts sect against sect—frequently assuming to proscribe one faith or another as unpatriotic. Faction takes the law into its own hands and lynches negroes. Faction mobilizes men of foreign blood—citizens and aliens alike—and spurs them to a divided and inimical allegiance. Faction frequently becomes articulate through "seditions and insurrections which are, unhappily, as inseparable from the body politic as tumors and eruptions from the natural body."<sup>1</sup> Faction always feeds on intemperate leadership and speech. President Harding recently declared:

<sup>1</sup> *The Federalist*, No. 28.

"My one outstanding conviction, after sixteen months in the Presidency, is that the greatest traitor to his country is he who appeals to prejudice and inflames passion, when sober judgment and honest speech are so necessary to firmly established tranquillity and security." Hamilton would utter similar warning if he were here to-day. "Watch the man or the organization who appeals to your prejudices," recently declared *The Western Advocate*. "They will bring a poison into your soul that will rob you of your friends and take away your peace of mind. They will in the end becloud the face of Jesus Christ and turn your path into spiritual darkness. No man can afford to sympathize with or encourage in the least any man or group of men who appeal to hatred and prejudice. . . . And now abideth hatred and prejudice and violence, these three; but the greatest of these is prejudice." Hatred and prejudice and violence! The constant off-spring of faction! The undercurrents of destruction, gnawing at the spirit of the Constitution and the life of the Republic!

Let it be clearly understood that every organization, serving a special purpose, is not factional, within the malignant meaning here described.

<sup>1</sup> Quoted in *The Literary Digest* of September 2, 1922.

Indeed, some of the most constructively patriotic groups in the life of the Nation are dedicated to the "special purpose" of fighting baneful faction.<sup>1</sup> Neither is fraternalism, as we know it in America, remotely related to the factionalism which must be banned. On the contrary, some of the rarest lessons in the American fidelities are taught by fraternal rituals. Fraternalism is one of the great American forces for social amalgamation; and, when it abjures the bigotry occasionally seeping in, it is titanic in its values. If the Fathers and the Founders could come back to life, most of them would be found in the fraternal lodges of the country.<sup>2</sup> Nor are political parties, factions, within this embargo. Dishonest demagogues may prostitute them to factitious ends, but inherently

<sup>1</sup> New York newspapers, for example, announced in October, 1922, the coalition of thirty patriotic societies, with a combined membership of more than 6,000,000 throughout the country, proposing to incorporate as the Allied Patriotic Societies to oppose radicalism and revolutionary doctrines and unsound tendencies, and to develop a comprehensive system for the dissemination of knowledge of American principles and institutions. The Security League serves similar ends. There are many other similar splendid groups.

<sup>2</sup> For instance, out of fifty-six signers of the Declaration of Independence, fifty were Free Masons. All of the Governors of the original thirteen States were Masons. Washington was Grand Master of the fraternity.

they further Constitutional necessities.<sup>1</sup> The American Legion is still another type of organization which, if it be construed as faction at all, must be rated as the highest possible specimen of such pro-Constitutional and pro-American faction as the perpetuity of the Government must have if it shall survive. The preamble to its own Constitution is one of the finest apostrophes to constructive loyalty ever put into language. If Hamilton were here to-day, he would be a Legionnaire—just as, in his own time, he was not only one of the most intrepid soldiers who ever followed the Flag and stepped to the music of the Union, but also one of the most implacably determined friends

<sup>1</sup> Factionalism occasionally has been carried to a point where it has dominated political parties, inviting ballots based on bigotry or class appeal, but never with electoral success. The "American Party" was an oath-bound organization sometimes called "The Sons of '76" or "The Order of The Star Spangled Banner" or, more commonly, "Know Nothings." It chiefly opposed aliens and Catholics. In 1856, it nominated Fillmore for President, along with the Whigs; carried one State, Maryland; and polled a total of 850,000 votes. The second party of this name was totally unlike the first. It was founded on opposition to secret societies, but never scored. An "Anti-Masonic Party," growing out of groundless hostility to Free Masonry cast 33,000 votes in New York State in 1828; 70,000 in 1829; and 128,000 in 1830. It had a candidate for President in 1831, but carried only the State of Vermont.

the soldier ever had, and one of the organizers of the famous Society of the Cincinnati.<sup>1</sup> In a word, this plague of faction is not inherent in all organizations serving a special purpose. The faction we discuss, the faction condemned by *The Federalist*, the faction which threatens American solidarity, is disclosed and branded by its own fruits—the bitterest upon the Tree of Liberty.

The real friends of ordered and unfractional freedom must be on guard, let it be remembered in this same connection, lest the best and cleanest of purposes be allowed to disintegrate into dangerous and factional trends. "It not infrequently happens," declared one sturdy American pioneer, "that, transported by the indignation arising from an attempt to destroy free government, its friends, by the measures they take to defend and support it, sap those principles upon which it is founded."<sup>2</sup> The unconstitutional invasion of the inalienable

<sup>1</sup> Speaking to a Michigan Legion Convention at Ann Arbor, September 6, 1922, President Burton of the University of Michigan rightly said that the Legion faces three big tasks—doing its part in stamping out mob violence, preventing actions which might lead to revolution, and in eliminating much of the class feeling which is becoming so pronounced in the United States. In order words, he called the Legion to war on faction.

<sup>2</sup> Letter of James Hughes of Kentucky, February 8, 1807. Hughes was a prominent lawyer, a Jeffersonian leader, who

right of free speech is a phenomenon in point—although, as will be discussed in greater detail later, many a culprit mistakes license for liberty in these respects. Perhaps the best, concrete example is the mixed reputation of the modern Ku Klux Klan. The Constitution and Laws of this weird tong is a noble peon of patriotism, inculcating many of the noblest lessons to which Americans can attune their souls.<sup>1</sup> Many a Knight of the K. K. K. undoubtedly gives himself exclusively to these ideals. Yet, the trappings of imperial power which the ritual pretends, the sepulchral robes and cowls which the order wears upon its errands of intimidation or of vengeance, and the mysterious secrecy with which it clothes its membership and operations, all invite unhealthy consequences at the hands of zealots who may take advantage of anonymous identity to ravish the very ideals to which their oaths are fore-sworn. As a result, the Klan suffers a dubious reputation in many quar-

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was disturbed by the extreme measures taken by his own partisans in the Burr conspiracy and treason cases.

<sup>1</sup> The Objects and Purposes, described in the Constitution and Laws, adopted September 29, 1916, are an address to "Chivalry, Humanity, Justice and Patriotism." "To protect and defend the Constitution and all Laws passed in conformity therewith," is a cardinal aim. "To shield the sanctity of the home and the chastity of womanhood," is a paramount doctrine.

ters, though in others it is wholesomely respected. Indeed, *The New York World* was awarded the Pulitzer Prize for the best piece of constructive journalism in 1921, because it disclosed the Klan in doubtful character.<sup>1</sup> Certainly there is no place in the America contemplated by the Constitution, for secret inquisitions which assume to censor the conduct or the consciences of citizens under the sovereign protectorate of the Bill of Rights. The

<sup>1</sup> The old K. K. K. was more definitely a problem. The K. K. K. Act of Congress, April 20, 1871, made it criminal for two or more persons to conspire or go in disguise upon the highway or upon another's premises for the purpose of depriving any persons of the equal protection of the Laws and privileges and immunities under the Laws. In *U. S. v. Harris*, 106 U. S., 629, this statute was declared invalid on the theory that the post-war Constitutional Amendments did not authorize Congress to legislate directly as to the acts of private persons. The Civil Rights Act of March 1, 1875, punished "conspiracy to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or the Laws of the United States." In *Ex Parte Yarborough*, 110 U. S., 651, this was held as a valid exercise of power to protect and enforce the right to vote. The *New York Tribune*, March 4, 1884, thereupon observed: "The Ku Klux Klan gets no encouragement from the Supreme Court. It was decided yesterday in the well-known Ku Klux cases that the Federal Government has power to prevent fraud and intimidation at elections. The most remarkable thing about these cases is that the question should ever have been raised."

K. K. K. does not appear to be susceptible of any precise calculation.<sup>1</sup> It must write its own decree, in the record of its actions. But its masks warn it, and the country, of its potential menace, because an abandonment of feelings of ordinary responsibility usually accompanies an abandonment of the means of personal identification: and, once unleashed under such anonymous auspices, "there is a contagion in example which few men have sufficient force of mind to resist."<sup>2</sup> Terrorism of any type cuts the heart out of the Constitution. It is faction at its worst. The "Black Hand" over-reaches the particular individual whom it immediately victimizes, and clutches at the throat of Columbia herself. The camorra, no matter what outward livery it wears, is a conspiracy against Law and Order.<sup>3</sup> Can there be any ques-

<sup>1</sup> *The Federalist's*, No. 52, phrase, acknowledging judicial doubt.

<sup>2</sup> *The Federalist*, No. 61.

<sup>3</sup> The Federal Council of Churches of Christ, representing 20,000,000 Protestants, passed resolutions, October 16, 1922, in part as follows: "Any organization whose activities tend to set class against class or race against race is consistent neither with the ideals of the churches nor with true patriotism, however vigorous or sincere may be its professions of religion and Americanism. Evils of lawlessness and immorality, however serious, can never be remedied by secret, private and unauthorized action. They must be handled by the state and by recognized forces of education."

tion what Hamilton would say if he were here to-day? The major motif of his life was his love of orderly, independent, sovereign American Government functioning exclusively through the institutions of Union. Every atom of his being revolted against the excesses of the French Revolution and his constant fear was that this spirit of abandoned respect for established institutions might communicate itself to the United States and threaten the Constitutional structure to the erection of which he had given his life. "I trust," he wrote upon occasion, "there is enough of virtue and good sense in the people of America to baffle every attempt against their prosperity, though masked under the specious garb of an extraordinary zeal for liberty. In a great Government, framed for durable liberty, not less regard must be paid to giving the magistrate a proper degree of authority to make and execute the Laws with rigor than to guard against encroachments upon the rights of the community; as too much power leads to despotism, too little leads to anarchy, and both eventually to the ruin of the people. When I perceive passion, tumult and violence usurping those seats where reason and cool deliberation ought to prevail, I acknowledge that I am glad to believe there is no real resemblance between what was the cause of America and what is the

cause of France; that the difference is no less great than that between liberty and licentiousness."<sup>1</sup>

Faction tries to sub-divide the prescription for American loyalty and read into it divers and sundry incongruous elements. For those who share these prejudices and these misjudgments there may be recommended one tragically spectacular cure. Let a spiritual pilgrimage be taken to the sanctified shrine upon the heights of Arlington, across from Washington, where the Potomac River washes the foot-hills of Virginia. Here lies The Unknown Soldier. On November 10, 1921, his single casket—from out the sacrificial vastness of the World War's unanswered mysteries—lay atop the historic catafalque, beneath the dome of the Nation's Capitol, where Lincoln and Garfield and McKinley slept. The altar of martyrdom! Somebody's Boy who cared less for life than for his country! Somebody's Boy who traded even his identity for immortality! All day long, from early morn till sunset gun, the hosts of the ten thousands filed past this solemn bier—strong men, proud to let tears flow unchecked—decorated heroes, come to bid a Buddy a last good-bye—black-veiled Mothers, lingering against the ropes, stretching on tip-toe, obviously trying to fling an eye beyond the im-

<sup>1</sup> *The Greatest American*, by Vandenberg, 133-134.

penetrable veils of death, begging answer to the eternal question burning in a broken heart. On the Friday morrow—third anniversary of armistice—Somebody's Boy was escorted to his long, last home amid the greatest pageant of power and sorrow that ever swept the lengths of Pennsylvania Avenue, the thoroughfare of history. Such funeral rites, in the marbled Memorial Amphitheatre at Arlington, never before so stirred a Nation's soul and—please God—never will again. The dearest, rarest decorations within the gift of Governments, Europe's and our own, were pinned above the silent heart, by the mightiest generalissimos of war. The President of the United States, choking with an emotion which gripped the whole, vast, mourning throng, was the only funeral orator whose exalted station befitting the occasion. God's hymns, mingling with the anthems of the Republic, swelled to high Heaven with an earnestness unknown since the days of 1776. It was consecration, dedication, deification. When, finally, the last wailing echoes of the bugles, sounding taps, had lost themselves in a requiem which burst the bounds of space and time and reached the utmost ends of earth, Somebody's Boy found Journey's End with a glory—and a message—as deathless as Truth and as invincible as Liberty.

And now, ye men of faction, come stand before the Unknown Soldier's modest tomb! Who lies within? What manner of man was he? Whence did he come? Was he from north or south of an obliterated Mason and Dixon Line? Did he hail from the east, or was it out of the west, he marched? Was he rich or poor? Capitalist or Laborer? Was he from the city or the farm? Was he native born or naturalized? Was he black or white? Jew or Gentile? Protestant or Catholic?

Nobody knows and nobody cares. Somebody's Boy might have been any one of these. All the petty, artificial distinctions that divide us, living, are lost in the challenge of this Unknown Soldier, wrapped in the folds of an eternal sacrifice. It suffices, for one and all, that he was true-blue in the zero hour of acid test. It is enough that he was faithful to his country and his Government, though faith called him to the Valley of the Shadow. What a lesson in the true measures of Americanism! What a damning repudiation of faction which dares to pretend to dictate a sub-divided formula!

"A momentous and surprising feature of the World War," declared Senator Colt of Rhode Island,<sup>1</sup> "was the National unity of America.

<sup>1</sup> Speech in Senate, August 29, 1922.

Made up of some forty different races, it was not believed that we were a Nation in any true sense. We were compared to Austria-Hungary and not to France. And yet, when war was declared, there was a National uprising unmatched, I believe, in the annals of mankind. As an illustration of National unity, more than 400,000 aliens enlisted under the Stars and Stripes."

This is true. It is also true that some of the deepest and most dependable fidelities which blessed the Government with their support, came from many naturalized citizens whose nativity was not only over-seas but oft-times within countries that became our martial foes. The Unknown Soldier might have been born in any one of a score of foreign lands. Also, it is true that we owe immigration for many of the sturdiest men and women who have helped our history and our cosmopolitan citizenship.<sup>1</sup> To pretend that native-

<sup>1</sup> Eight of the men who sat in the Constitutional Convention and signed the finished document were of foreign birth, including Hamilton and Robert Morris, the financier of the Revolution, and James Wilson, one of the most influential of all the Charter-builders. In contemporary times, among many foreign-born Americans who made large contribution to social, economic and political history, may be mentioned Louis Agassiz, great naturalist, Franklin K. Lane, eminent statesman, Andrew Carnegie, philanthropist, George W. Goethals, builder of the Panama Canal,

born Americans possess a monopoly on the virtues of patriotism is nonsense. On the contrary, many a native son takes his heritage wholly for granted, as if it were an automatic, natural franchise which belongs to him by divine right and which demands of him no reciprocity of service: whereas, most naturalized citizens—with a back-ground of Old World experiences which permit them a more accurate assessment of American values—cherish their new possession with an affection which understands its worth. These things must be clearly borne in mind, lest injustice attend consideration of the fact that there is a reverse side to the shield which shows a close and a dangerous relationship between faction and immigration.

The unassimilated alien—the un-Americanized citizen—is putty in the hands of the designing exploiteer. He falls wholly outside the class described in the preceding paragraph. In war, he lends aid and comfort to the enemy, with covert sympathies which leap the oceans and renew a back-stairs allegiance which brands him as an ingrate, a parasite and a traitor. In peace, either

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Alexander Graham Bell, of telephone fame, Samuel Gompers, Labor leader, James J. Hill, pioneer railroad builder, John Holland, inventor of the submarine, Henry Morgenthau, diplomatist, Jacob Riis, sociologist, etc.

his ignorance of the American institutions which have afforded him hospitality and sanctuary, or his dissatisfied failure to find or to make a place for himself in the New World, or his general ineligibility to our ways of ordered freedom, put him into the mob-ranks of distempered radicalism which snarls at Government and plots its undoing. Such aliens as these are a menace to the whole fraternity of naturalized Americans, as well as to the country. And America has herself alone to blame—not these poor, untutored dupes of circumstance—if she permits immigration at a rate so great that these foreigners come to us faster than they can be assimilated, faster than they can be placed in gainful occupation, faster than they can be taught, constructively, to use and to appreciate the advantages of their re-birth. Unrestricted immigration is the spawn of faction. It is the endowment of anarchy. The United States has got to cease being a polyglot boarding house.

It is past time to look this situation in the teeth, when the foreign-born white population of the country is 13,712,754—more than the total population of the country in 1830; when there are as many known aliens, male and female, twenty-one years of age and over in the United States—5,559,185—who have never applied even for their

first citizenship papers, as the total population of the Pacific States, California, Oregon and Washington; when there are as many alien males of voting age in New York State—446,859—as the entire population of Utah or Idaho or the District of Columbia; when there are as many alien males and females of voting age—772,076—in New York City, without a single tie or obligation to the Government, as the total population of Maine or the combined populations of New Mexico, Arizona and Nevada. These are startling figures.<sup>1</sup> It is more than a coincidence that the number of illiterate males, over twenty-one, in the United States is 2,192,368 and the number of unnaturalized alien males of the same age is 2,138,237. The safety of our republican institutions is proportioned to the intelligence and the responsibility of those whom these institutions serve. The malignancy of faction is nourished by illiteracy and irresponsibility. Straight as a pike-staff reads the warning that our vaunted melting pot is running over. We owe no greater obligation to the world than we owe to our own posterity. Indiscriminate immigration must be stopped. Run down the average cabal of communism, and you'll find, here in America that

<sup>1</sup> All figures based upon documents issued by the Department of Commerce in connection with the 1920 census.

it speaks a foreign tongue. Assess the antecedents of anarchy and its crimes, here in America, and you'll usually discover that foreigners predominate. Are we under greater compulsion to preserve the sanctuarial character of the United States as an asylum for all the "down trodden and oppressed" of earth, than to protect the Nation's republican character against the faction and the intrigues and the poison of itinerant guests who have no stake in the land they undertake to wreck? What else did *The Federalist*<sup>1</sup> have in mind, if read in modern application, when it prophetically said:

"Nothing can be more chimerical than to imagine that in a trial of actual force, victory may be calculated by the rules which prevail in the census of the inhabitants, or which determine the result of an election. May it not happen, in fine, that the MINORITY of CITIZENS may become a MAJORITY of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the Constitution of the State has not admitted to the rights of suffrage? I take no notice of an unhappy species of population abounding in some States, who, during the calm of regular government, are sunk below the level of men: but who, in the tempestuous scenes of civil violence,

<sup>1</sup> No. 43.

may emerge into the human character, and give a superiority of strength to any party with which they may associate themselves.”<sup>1</sup>

Congress undertook to give post-war recognition to the need of bars at America’s ports of immigration entry. It was—and is—a bungling, unscientific piece of work, though better than no restrictions at all. This new Law, in brief, provides that new immigrants equal in number to three per cent of those foreign-born nationals of any country already here, may be admitted in any one year. In other words, it basically undertakes to reduce immigration to the terms of a problem in arithmetic, with all emphasis upon quantity, and practically none upon quality. As if eligibility to partnership in the exalted blessings of America can be measured with a yard stick! Up to three per cent, the bad may enter: beyond three per cent, the good must stay out! As sensible it would be to try to guage integrity with pint cups, or to test

<sup>1</sup> Thus when a train was wrecked near Gary, Indiana, during the 1922 railroad strike, an examination of the men held disclosed the following: A—born in Hungary, not a citizen; B—born in Lithuania, not a citizen; C—born in Lithuania, has only first citizenship papers, though he has been in America seventeen years; D—born in Italy, not a citizen, active member of the I. W. W., also of Communist Party.

a soul with a tape line! To limit the numbers of immigrants is important: but vastly more important is to limit deceased minds and bodies and twisted visions and treacherous hearts and unhealthy purposes—the deadly recruits of lethal faction. The need, in the spirit of the Constitution, is to test the moral, social, mental and physical cleanliness of the candidate for immigration, at the port of debarkation where he has already made for himself a certain character in his old environment; then if he is sound—and there is economic room for him—to let him pass, otherwise to bar him, as we would bar any other plague; then to provide him with constructive hospitality when he arrives so that every facility may encourage his healthy Americanization; then, if he fails to qualify within reasonable length of time, if he fails to enter citizenship, to send him back to the land from whence he came. Under such a rule, the faction which feeds on exploited immigrants will die of famine. The country will be saved from “THIS DANGEROUS VICE,” and immigrants will be saved from themselves. Is there any doubt that Hamilton, if he were here, would approve this rule? He himself was an immigrant—a friendless foreigner upon the docks of Boston at the age of fifteen. Two decades later he was the presiding

genius over the destinies of a new Nation. He could do no less than plead for a kindred chance for other earnest lads whose misfortune it may be to have first seen the light of day beneath some other flag. But, with his invincible devotion to the purity of American citizenship, and with his incorrigible opposition to infiltration by any weakening elements, he would demand a rigid rule of conduct under which the importation of taint or menace would be impossible.

So far as religious freedom in the United States is concerned, it scarcely seems necessary to reiterate that the Constitution is an iron mandate, inflexible in its guaranty of liberty to conscience. Indeed, it is so thoroughly an American axiom that *The Federalist*<sup>1</sup> takes it for granted and uses it, in argument, as a fixed point of comparison when it says: "In a free Government, the security for civil rights must be the same as that for religious rights." Yet, when faction moves into occasional bigotry of virulent type in these modern times, it sometimes seems as though the situation had become reversed with the years, and that the modern need is to plead that "religious rights" shall be held no less secure than "civil rights." Some philosopher once said that, though systems of

<sup>1</sup> No. 51.

faith are different, God is one. He might have added that, however much these systems differ, the American is free to worship God in his own way, in his own time, at the altars of his own untrammeled choosing: and whenever the zealotry of faction—spurred by motives more sincere than sane—invites one American to hate another, to doubt another, to war upon another, because of a religious difference, it stimulates a withering plague at fatal odds with the spirit of the Constitution and the structure of our free Government. Faction—“THIS DANGEROUS VICE”—takes no more bitter form than when it aggravates religious animosities. Nor is it ever more unfair. What sect, what faith, has ever monopolized the pedestals of patriotism? What church can claim the Unknown Soldier? And yet what awful schism can be created in an otherwise united people by religious faction, with no credentials but its own bigotry and its own suspicions! The professional religion-baiter, in America, plots larceny against the birth-right of the Nation. Secretary of State Hughes, speaking in 1922 at the laying of the corner-stone for the National Baptist Memorial to Roger Williams, uttered words worthy of Hamilton if he were here to-day:

“The right of religious liberty, which has become

a truism, carries with it an inhibition that no one should seek through politics to promote the activities of religious organizations, or should intrude differences of religious faith or practice into political controversies. We are so familiar with the conception of religious freedom that we are likely to forget at what cost liberty of conscience has been won, and also the danger to which we are constantly exposed of a recrudescence to bigotry. . . . Strong convictions, especially religious convictions, are apt to develop tyrannical purpose, and no faith is so pure that it is never in danger of being made the instrument of the mistaken zeal of those who would deny to others the right to think as they choose."

*The Federalist*<sup>1</sup> indicated a belief that the expansion of the Governmental and social unit, from the State to the Nation, would partially immunize the new country against religious faction. "The influence of factious leaders," it declared, "may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national

<sup>1</sup> No. 10.

council against any danger from that source." To substantial degree, history has justified this optimism. But, nevertheless, religious faction constantly shows a nasty mein—less often the responsibility of any sect than of those who marshal prejudices against some sect; and is of such moment as not only to irritate domestic homogeneity, but also to debit our reputation abroad.<sup>1</sup>

Once and for all, so long as this land retains the character of its foundation, America must sustain the letter and the spirit of the Constitutional guarantee that "Congress shall make no Law respecting an establishment of religion, or prohibiting free exercise thereof," and the citizenship of America must weave this doctrine into the warp and woof of its life and contacts.

Even more pronounced than religious faction, is racial faction. If there is, as has been said, a rising tide of color beating toward the white man's shores, we have a right—aye, an obligation—to defend our immigration gates against the influx of alien races which, in time, easily could overwhelm our white complexion. But this problem is

<sup>1</sup> Dr. Manoel de Oliveira Lima of Brazil, in his final lecture at the Williamstown Institute of Politics, August 22, 1922, flatly warned that the prestige of the United States in South America has been injured by some of our religious propaganda.

wholly outside and beyond the more intimate proposition that we have no right—aye, a specific Constitutional obligation to the contrary—to trespass upon Law and Morals in our treatment of other races already here. This observation, in the nature of things, particularly applies to the negro. There is no danger of his color over-whelming ours. His mass development—despite glaring exceptions—has been little short of marvelous, considering his environment and opportunities, in the short half century since he was a slave. His mass loyalty to the Government is entirely beyond question. Remember: the heart, not the skin, is all that counts with us in the presence of the Unknown Dead! In the face of such contemplations as these, there is no negro half so black as the blemish which Lynch-Law puts upon the white man's record; and there is no phase of faction more relentlessly un-American, in this modern day, than that which practises hempen vigilance. Granted, that there is sometimes almost irresistible aggravation to spur summary justice to its retributive mark. But, grant, also, that *The Federalist*<sup>1</sup> was right when it warned that “every breach of the fundamental Laws, though dictated by necessity, impairs that sacred reverence which ought to be

<sup>1</sup> No. 25.

maintained . . . towards the Constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable."<sup>1</sup>

Since 1885, including the first six months of 1922, there have been 4,127 persons lynched in the United States. Of this number, 3,097 were negroes. Nearly every State is represented on the roll. The only States that have had no lynchings, since 1882, are: Massachusetts, Rhode Island, New Hampshire and Vermont. Georgia and Mississippi head the list. It is the worst possible excrescence of faction. The Republican National Platform for 1920 included the following plank: "We urge Congress to consider the most effective means to end lynching in this country which continues to be a terrible blot on our American civilization." Just what Congress can Constitutionally do, remains to be seen, because the lynch-mob normally falls to the jurisdiction of the police power of the States. But there is no doubt that if Hamilton were here to-day, he would challenge this invasion of Constitutional guaranties with all the

<sup>1</sup> It is pertinent, with particular reference to the negro question, to observe that Hamilton was one of the pillars of the first American Abolition Society, formed in 1784 to accomplish gradual and legal emancipation; also that Hamilton always refused to own a slave.

vigor at his command; and that he would find the means to cope with it as a National problem, in the event that the States continue to refuse to set their own houses in order. What else could *The Federalist*<sup>1</sup> mean, in modern application, when it says: "A turbulent faction in a State may easily suppose itself able to contend with the friends to the Government in that State; but it can hardly be so infatuated as to imagine itself a match for the combined efforts of the Union." And what else is a lynch-mob, uncontrolled by the State in which it operates, but a species of insurrection concerning which *The Federalist*<sup>2</sup> plainly said: "Should such emergencies at any time happen under the National Government, there could be no remedy but force."

Any force which undertakes to operate outside the Law, is faction within the meaning of *The Federalist's* prescription.<sup>3</sup> Any force which under-

<sup>1</sup> No. 27.

<sup>2</sup> No. 28.

<sup>3</sup> Two news despatches of September 13, 1922, well illustrate the differentiation. At Fort Worth, Texas, it was reported that the "Ladies of The Invisible Eye" flogged a woman of forty-one. At Birmingham, Alabama, it was reported that business suspended for two hours while a new Law enforcement and observance league was formed to stop lawlessness in general, but foggings by midnight bands in particular. The former thing is faction; the latter, legitimate and essential battle against faction.

takes to order the Law according to its own extra-legal interpretation and appetite, is faction. "All obstructions to the execution of the Laws," said Washington's Farewell Address, "all combinations and associations, under whatever plausible character, with the real design to direct, control, counteract, or awe the regular deliberation and action of the constituted authorities, are . . . of fatal tendency. . . . However combinations or associations of the above description may now and then answer popular ends, . . . they are likely to usurp for themselves the reins of Government, destroying afterwards the very engines which have lifted them to unjust dominion." Faction sometimes pleads a well-nigh unanswerable necessity for its extra-legal enterprises. But the grave trouble is that "whenever a wrong principle of conduct, political or personal, is adopted on the plea of necessity, it will be afterwards followed on a plea of convenience."<sup>1</sup> Even Government itself, under stress of peril, frequently shows susceptibility to "THIS DANGEROUS VICE." Chief Justice Chase, in the Supreme Court, exemplified and explained how these situations develop. As a member of the Court in 1870 he denied the Constitutionality of a

<sup>1</sup> The language of Supreme Justice Field in *Juilliard v. Greenman*, 110 U. S., 421.

“Legal Tender Law” which he had previously supported while serving as Lincoln’s Secretary of the Treasury. In his subsequent decision<sup>1</sup> he said: “It is not surprising that amid the tumult of the late Civil War, and under the influence of apprehensions for the safety of the Republic, almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the Constitutional limits of Legislative or Executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted, yielded their doubts; many who did not doubt, were silent. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, reconsidered their conclusions.”

Many modern Americans know exactly what was in Chief Justice Chase’s heart when he spoke these words; because our own recent war experiences gave similar excuse and stimulus to certain of these vigilante zeals. Impatient America, once roused to the martial hunt, encouraged and embraced discipline at the hands of unofficial proctors who could decree yellow paint for the luke-warm, and

<sup>1</sup> Hepburn *v.* Griswold, 8 Wall, 603

tarred feathers for the tepid. When there were funds to be raised, the Government assigned "quotas" to the Federal Reserve Districts; the Districts re-assigned them to the States; the States, to their Counties; and then, not infrequently, the Counties—applying these precedents literally—gave recalcitrant subscribers the choice of meeting an individual "quota" or riding a rail. Some of these episodes, no doubt, were in the mind of a great British satirist<sup>1</sup> when he wrote: "The more private records of the methods by which the American War Loans were raised, were so amazing that they put the guns and the possibilities of a raid clean out of our heads for the moment." It all seemed necessary at the time.<sup>2</sup> God knows the motives were as lofty as the utmost peaks of human capacity. The zealotry of a crusade lay upon a patriot people's soul. In war the end usually seems to justify the means. We learned the old frontier habit of deciding for our-

<sup>1</sup> George Bernard Shaw in his *Heartbreak House*.

<sup>2</sup> These extrajudicial recourses were the exception and not the rule: it would be a libel on the superb spontaneity of American patriotism not to proclaim that most of these vast billions were volunteered. The total quotas in the five loans were as follows: first, \$1,989,455,550; second, \$3,807,865,000; third, \$4,175,650,050; fourth, \$6,964,581,-250; fifth, \$4,497,818,750.

selves whether our neighbors squared with our ideas of what devotion and probity ought to be; and then we learned the habit of assessing their delinquencies by drum-head court martial. It was a reversion to type. We were our brothers' keepers. There was exaltation and exhilaration in the sense of super-patriotism: and there was essential utility to be served in net result. "Clear The Track" was a universal motto—with action suited to the word. But, in coldly analytical retrospect, it was all extra-judicial. It was outside the law—though that statement is something of a paradox, because there was no Law to fit.

But now having put war aside, we must also put aside its licenses. We must abjure these censorial pedestals upon which we buoyantly climbed to rule by mandate of patriotism. The tolerated—aye, the justified—expedient of yesterday, is become an excrescence to-day. Purity of motive ceases to vindicate the extra-legal dispensation of justice in a "government of laws." Just as a chain is no stronger than its weakest link, so the Nation is no stronger than the minimum fidelity of its people to the processes of law. The pioneer could excuse his summary recourse to hemp and lead as arbiters of crude justice: there were few statutes, and fewer courts, to which he could appeal. But no such

philosophy can properly obtain to-day. There is no devotion higher than fidelity to law: no crime greater in breaking the law than in borrowing its sovereignty for private verdicts or for private vengeance. And this is the crime of faction.

It is a species of faction when organized traffic in illicit alcohol sets out to evade the newly proclaimed Eighteenth Amendment to the Constitution. The so-called boot-legger, and his customer, deal not only in bad liquor, but in equally bad patriotism. *The Federalist* bespoke no sterner rebuke to any faction than that which presumes to immunize itself against lawful regulations to which it dislikes to assent. If Hamilton or, indeed, any of his compatriots, were here to-day, they would probably be startled at the progress of sumptuary Legislation to a Prohibitory point not dreamed of in the days of historic toddies.<sup>1</sup> But the character of the restraints, Constitutionally adopted, would appeal to them as of vastly less

<sup>1</sup> A recent book—*What Prohibition Has Done to America*, by Fabian Franklin—goes so far as to say: “The Eighteenth Amendment is not only a perversion but also a degradation of the Constitution. In the earlier days of our history—indeed up to a comparatively recent time—if any one had suggested such a thing as a Prohibition Amendment to the Federal Constitution, he would have been met not with indignation but with ridicule.”

moment than the character of the enforcement of the restraints. Washington and Hamilton fought a "Whiskey Rebellion" in Western Pennsylvania, involving a question of Federal authority to levy an excise tax. They would as readily fight any "Whiskey Rebellion" to-day, involving a question of Federal authority to enforce the sovereign mandate of its own Constitution, and—let this be emphasised—to enforce it equally against rich and poor alike. The Law must know no favorites.

A prominent journal devoted to the cause of absolute Prohibition<sup>1</sup> said: "Those who favor modification of the Volstead Law to legalize beer and light wines, for home consumption without the saloons, are 5% Americans; America has no place for 5% Americans except in jail." This is a false doctrine. We do not discuss the merits of Prohibition or of the Volstead Law, in this connection. We discuss the legitimate and proper means of American approach to a moot problem. The 100% American thing for those who oppose Prohibition in the abstract, or the Volstead Law in the concrete, is to seek, by lawful means to get the Laws changed. The "5% Americans" are those who ignore and defy the Law as it exists, without change. Any other theory would be in

<sup>1</sup> *The American Issue*, March 11, 1922.

conflict with every doctrine and purpose of the Constitution. The people always are privileged to change Laws which a majority dislikes. To deny them this prerogative would be to leave nullification as the only avenue of release, and the outlawry of faction as the only agency to be embraced. It is this latter thing, above all else, against which vigilance must be perpetual.

It is still another species of faction when Legislative bodies, oath-bound to serve the whole welfare of the whole people, split into ambitious groups or juntos or blocs, created to obtain special favor for a special interest. Time was when this thing familiarly known as "Big Business" was the dominating special interest in these respects. But "Big Business" is reasonably tamed to useful purposes, now; and, if it isn't, at least it has a multitude of competitors for special favor. There are Labor blocs and Liquor blocs and, most recently potential of all in the National Congress, a Farm bloc. The fact that a Farm bloc, for example, may serve temporarily just ends, cannot affect the basic principle that class divisions, in Legislatures as among the people, are factional divisions, and that the theory of the Constitution is hostile to every notion of factional or class representation. Without intending invidious comparison, it might

be said, parenthetically, that class representation is more nearly a Soviet ideal. *The Federalist*<sup>1</sup> flatly declared that "the idea of an actual representation of all classes of the people, by persons of each class, is altogether visionary." It insisted that any such basis of representation was incompatible with the structure of the Republic. Has any one so crooked an imagination as to conceive that Hamilton, if he were here to-day, would belong to any one of these blocs? Indeed, so far as a Farm bloc is concerned, Hamilton put all of his persuasive powers at work to prove that there can be no permanently useful prosperity which is not planned reciprocally for the composite interests of the whole Nation, with the fully protected rights of Agriculture and the equally protected rights of Industry blended. If faction, however earnest and honest, disputed him to-day, he would probably re-quote *The Federalist*<sup>2</sup>:

"The often-agitated question between agriculture and commerce has, from indubitable experience, received a decision which has silenced the rivalship that once subsisted between them, and has proved, to the satisfaction of their friends, that their interests are intimately interwoven. It has been found in various countries that, in proportion as

<sup>1</sup> No. 35.

<sup>2</sup> No. 12.

commerce has flourished, land has risen in value. And how could it have happened otherwise? Could that which procures a freer vent for the products of the earth, which furnishes new incitements to the cultivation of land, which is the most powerful instrument in increasing the quantity of money in a state—could that, in fine, which is the faithful hand-maid of labor and industry, in every shape, fail to augment that article, which is the prolific parent of far the greatest part of the objects upon which they are exerted? It is astonishing that so simple a truth should ever have had an adversary; and it is one, among a multitude of proofs, how apt a spirit of ill-formed jealousy, or of too great abstraction and refinement is to lead men astray from the plainest truths of reason and conviction."

It is a species of baneful faction whenever industrial Bourbons unite to exploit Labor or the great consuming public. We have already seen, in a preceding chapter, how faction easily involves itself in many different phases of the whole industrial equation. Illegitimate commercial selfishness and greed, whether chargeable to Managers or Men, is faction that sells its birth-right for a mess of pottage. To whatever degree those critics are correct who charge that modern

America has sold itself to Mammon—with acquisitive eyes riveted upon the Mint, as the favorite emblem of Government and life and human aspiration—faction of the most sordid type takes possession of the American soul.

But the worst of all faction, incidental to the business world, is that which chapters industrial disputes with violence and sabotage—square challenge to the fundamental purpose of a Nation built on theories of Law and Order. Those who indulge in these piratical pursuits invariably are but a trivial minority, in numbers, of those who have a stake in the cause at issue. Indeed, the majority, in numbers, ordinarily condemns, at heart, all such mistaken methods for mis-serving a common cause. But since Lawlessness creates a paramount necessity to vindicate the Constitution—and forces all other issues aside until Lawlessness is cured—the crimes of the minority, in this respect, overwhelm the virtues of the majority and become the one magnified and monopolizing target against which the whole force of Constitutional citizenship must mobilize. Faction, in such circumstance, is the common enemy not only of the cause which it mistakenly pretends to serve, but also of the Constitution, the Government, and every right-minded person beneath the Flag. “As to those partial commotions

and insurrections, which sometimes disquiet society, from the intrigues of an inconsiderable faction, or from sudden and occasional ill humors that do not affect the great body of the community, the general Government could command more extensive resources for the suppression of disturbances of that kind than would be in the power of any single member," said *The Federalist*.<sup>1</sup> In other words, the responsibility of the whole Union of States is intended as a perpetual and unyielding barrier to faction which subverts the Law, because all such faction is closely kin to the climax in all faction—anarchy.

One of the most staggering examples of the red extremes to which unbridled lawlessness can go, was given to the country at Herrin, Illinois, on the night of June 22, 1922. Here, in a welter of industrial strife, twenty-two men—imported to reopen coal mines that were closed by strike—were slaughtered in cold blood. There is no more sordidly inhuman tragedy in the annals of a brutalized Russia or a decimated Armenia. The most notorious of all "Hun atrocities" were no worse. Non-union miners were herded in shackled groups, driven into the open country, and shot as they stumbled away from their ruthless murderers.

<sup>1</sup> No. 16.

The most unspeakable cruelties were invoked.<sup>1</sup> For months afterward scarcely a hand was lifted to search out the awful responsibility. The sullen community itself displayed little or no remorse. On the contrary, with dull effrontery, it seemed almost to glory in its dregs. The "majesty of the law" was a pathetic mockery. Nearly two months later, President Harding, in a message to Congress, called the thing a "butchery of human beings, wrought in madness," and pleaded for greater federal authority, with particular reference to the protection of aliens, to serve America's "outraged sense of justice" and her "humilia-

<sup>1</sup> A typical news despatch from Herrin at this time reads as follows: Herrin, June 22.—Out in a road near the mine, six men, tied together and all wounded by bullets and blows, lay in a scorching sun, while hundreds of men and women laughed at their pleas for water. One of the men, his face bloody and one shoulder shot away apparently was within a few minutes of death. "Please, boys, give me a drink," he moaned. A laugh from the hundreds of spectators was the only reply. The correspondent rushed to a house for water and when he returned he was faced by a sword and quickly drawn pistols and told to keep away. When the man begged again for water, "for God's sake," a young woman with a babe in her arms placed her foot on the mangled body and said: "I'll see you in hell before you get any water." The men apparently had been dragged along a rocky road behind an automobile. Their clothes were torn and pieces of gravel were imbedded in their mangled flesh.

tion."<sup>1</sup> This is a specimen of the extremes to which lawlessness can graduate. Whether the bad judgment of mine operators, in challenging a striking community by attempting the importation of strike breakers, shared moral responsibility, is beside this particular point. The basic proposition brooks no palliation: this thing is anarchy, and against it—no matter what its form or degree or excuse—every loyal-hearted American citizen must set his face and heart like steel. There can be no American compromise with lawlessness, any more than there can be compromise with a rattlesnake. Those who think to profit by it, are, ultimately the ones to suffer most.<sup>2</sup>

<sup>1</sup> Message of August 18, 1922.

<sup>2</sup> Following the Herrin tragedy, Frank Farrington, President of the United Mine Workers of Illinois, issued an appeal to all Illinois miners, on June 25, 1922, partially as follows: "This is an appeal to you and through you to our members that you and they coöperate to keep down disorder and violence. Acts of disorder and violence only stir the public against us and make bitter enemies for us in places where we must have strong friends. Acts of destruction may appease inflamed and angered minds, but cannot win any permanent success and if victory depends on violence our cause is hopelessly lost. Already we are in disrepute in the public mind and threatened with legislation that to say the least will cripple our union for years to come, if indeed, the weight of it does not sink the United Mine Workers of America. Therefore, I appeal to you to enlist

When, finally, open anarchy shows its ugly face—what Carlyle called “the consecration of cupidity and braying of folly,” and “slop-shirts attainable three-halfpence cheaper by the ruin of living bodies and immortal souls”—the scurrility and malediction of faction reach their peak. *The Federalist*<sup>1</sup> felt sure that “The Citizens of America have too much discernment to be argued into anarchy”; and the record of the years verifies this confidence that no considerable sector of our people can be communized simultaneously. Nevertheless, there is a clear call to all lovers of their native land to relax no vigilance against this seeping sin. There are various degrees of anarchy, though all degrees are to be gauged solely by their threat to the established fundaments of Constitutional Government. There are various shades of sedition, though the entire spectrum shows a crimson caste which leaves little room for discriminating choice.<sup>2</sup> With none of these degrading, abortive enterprises, the help of the sober-thinking members in your local union and have them join you in maintaining order and obedience to the laws of our union and the land.”

<sup>1</sup> No. 26.

<sup>2</sup> For example, the commonly attributed slogan—“No God, No Flag, No Country”—leaves the Industrial Workers of the World small chance to plead American sympathy. The Short Constitution, by Wade and Russell, reports resolutions adopted in a New York mass meeting, December

can Constitutional America compromise for one condoning hour. We are constantly told that restrictions against this potential ruin, must not invade the rights of free assemblage and free speech; and, of course, it would be an anomaly to defend freedom by invading it. But is it not a more indefensible anomaly for faction, which pretends to aim at superior liberties, to meditate the destruction of the root, tree and branches of all American liberty? "Liberty is to faction," said *The Federalist*,<sup>1</sup> "what air is to fire, an ailment without which it instantly expires. But it could not be less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency." In other words, we must take care not to infringe the Constitutional rights of legitimate free speech, when we clamp embargo down upon the illegitimate—and sometimes our zeals carry us too far in these respects. But we are entitled, with all the vigorous Law that can be put at our command, to curb license when it

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2, 1917, carrying this preamble: "We are the Bolsheviks of America; we denounce Governments, institutions, and society; we hail social revolution and the destruction of the existing order of things."

<sup>1</sup> No. 10.

threatens the annihilation of liberty itself. In fact, it is molly-coddle, maudlin nonsense for self-preserving Americanism to take any other view. Justice Story once defined free speech as follows: "Every man shall have the right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, and reputation; and so always that he does not thereby disturb the public peace or attempt to subvert the Government." The rights of the syndicalist leave off where they invade the rights of the patriot. The Chicago *Tribune* has, editorially, correctly said: "Men whose principle of conduct is the imposition of their theories by force, should not be allowed to escape the Law because their action clothes itself in a political theory; it was never intended that the guaranty of free discussion should thus destroy itself; it was established to protect freedom and not to abolish it." As Vice-President Coolidge well said at the Wellesley Industrial Conference: "One of the greatest tragedies of American institutions is the experience of those who come here expecting to be able to rule, without rendering obedience." While we owe it to candor to be liberal with those disciples of unrest who are merely exercising the Constitu-

tional right of free speech when they urge their reforms within the Law, we owe it equally to candor and to a just regard for our responsibility to posterity to be as cold and as hard as steel in our repression of any and all equivalents of anarchy; and we are criminally gullible if we permit communistic camouflage to disguise the real intent of any convulsive movement which seeks an anarchistic end. Theodore Roosevelt, speaking in the shadow of President McKinley's assassination, said<sup>1</sup>: "The anarchist and especially the anarchist in the United States, is merely one type of criminal, more dangerous than any other because he represents the same depravity in a greater degree. The man who advocates anarchy directly or indirectly, in any shape or fashion, or the man who apologizes for anarchists and their deeds, makes himself morally accessory to murder before the fact. The anarchist is a criminal whose perverted instincts lead him to prefer confusion and chaos to the most beneficent forms of social order. His protest of concern for workingmen is outrageous in its impudent falsity; for if the political institutions of this country do not afford opportunity to every honest and intelligent son of toil, then the door of hope is forever closed against

<sup>1</sup> Message to Congress, December 3, 1901.

him. The anarchist is everywhere not merely the enemy of system and of progress, but the deadly foe of Liberty. If ever anarchy is triumphant, its triumph will last for but one red moment, to be succeeded for ages by the gloomy night of despotism.

"For the anarchist himself, whether he preaches or practises his doctrines, we need not have one particle more concern than for any ordinary murderer. He is not the victim of social or political injustice. There are no wrongs to remedy in his case. The causes of his criminality are to be found in his own evil passions and in the evil conduct of those who urge him on, not in any failure by others or by the State to do justice to him or his. He is a malefactor and nothing else. He is in no sense, in no shape or way, a 'product of social conditions,' save as a highwayman is 'produced' by the fact that an unarmed man happens to have a purse. It is a travesty upon the great and holy names of liberty and freedom to permit them to be invoked in such a cause. No man or body of men preaching anarchistic doctrines should be allowed at large any more than if preaching the murder of some specified private individual. Anarchistic speeches, writings and meetings, are essentially seditious and treasonable. Anarchy is a crime

against the whole human race; and all mankind should band against the anarchist. His crime should be made an offense against the law of nations, like piracy and that form of man-stealing known as the slave-trade, for it is of far blacker infamy than either."

*The Federalist* constantly urged its belief that one of the elements of strength inherent in the proposed new Constitutional order, was the greater facility with which society could combat any and all of these many and differing elements of faction. "The causes of faction cannot be removed," it said; "relief is only to be sought in the means of controlling its effects." One of the mastering reasons why the Fathers chose to erect a Republic rather than a pure democracy was frankly set down as a desire to fight faction and control its effects by "opposing greater obstacles to its concert and accomplishment." If Hamilton were here to-day, he would deny sympathy or remotest encouragement to any element of faction—"THIS DANGEROUS VICE." His matchless eloquence would plead with his countrymen to search their hearts against the possibility that some seed of faction might loiter there. His courageous example would stand forth to inspire them into

<sup>1</sup> No. 10.

union against any agency of faction, and against "the dishonest artifices of sinister and unprincipled" demagogues who start these fires in order to warm themselves, and to collect a tariff on prejudice and bigotry and passion and ignorance. "Hearken not to the unnatural voice which tells you that the people of America, knit together as they are by so many cords of affection, can no longer live together as members of the same family; can no longer continue the mutual guardians of their mutual happiness; can no longer be fellow-citizens of one great, respectable and flourishing empire. . . . No, my country-men, shut your ears against this unhallowed language. Shut your hearts against the poison which it conveys."<sup>1</sup> The most formidable of all domestic faction in America was buried in the ultimate peace which brought North and South into an indefeasible solidarity. There must be no disruptive renaissance builded upon other scores.

<sup>1</sup> *The Federalist*, No. 24.

<sup>2</sup> *Ibid.*, No. 14.

## The Measure of Democracy

“The demon of faction will, at certain seasons, extend his sceptre over all numerous bodies of men.”—*The Federalist*, No. 65.

“Representatives must be raised to a certain number, in order to guard against the cabals of a few, and, however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude.”—*The Federalist*, No. 10.

“The more numerous an assembly may be, of whatever characters composed, the greater is known to be the ascendancy of passion over reason. In the next place, the larger the number, the greater will be the proportion of members of limited information, and weak capacities. Now, it is precisely on characters of this description that the eloquence and address of the few are known to act with all their force. In the ancient Republics, where the whole body of the people assembled in person, a single orator, or an artful statesman, was generally seen to rule with as complete a sway as if a sceptre had been placed in his single hand. On the same principle, the more multitudinous a representative assembly may be rendered, the more it will partake of the infirmities incident to collective meetings of the people. Ignorance will be the dupe of cunning, and passion the slave of sophistry and declamation.”—*The Federalist*, No. 58.

ONE of the favorite fallacies of our time is the notion that the useful measure of democracy, in a

representative Republic such as ours, lies in the "quantity" rather than the "quality" of power that is resident in mass citizenship. This theory subscribes to the conceit that there is always supreme safety, and no element of danger, in numbers —the same idea, in effect, which reaches its climax in the commune. It is at direct variance with the representative principle upon which the American Government was founded; and it is denied not only by the admonitions of the ages, but also by American experience down-to-date. For example, it measures the efficacy of a ballot by its length—by the number of elective positions that can be crowded upon the attention of the voters—without slightest heed to the probability that a shorter ballot, and a lesser number of elective positions would permit a greater concentration of resultful public attention upon fewer trustees who will, accordingly, carry a more definite responsibility, and who can, as a result, be held to stricter accountability.<sup>1</sup> It deems that State most secure in its popular advantages, where the broadest opportunities permit direct law-making by the people—without regard to the probability that a

<sup>1</sup> "The Constitution provided for a short ballot; the Republic itself is the short ballot plan."—*Back to The Republic*, by Harry F. Atwood, 89.

deliberative Legislature might enjoy opportunities, to perfect the essential details of legislation, totally lacking where an inflexible proposition goes to the whole electorate on initiative or referendum, yet constantly necessary to the completion of finished and adequate statutes. It is a school of political thought which tests every principle of Government by the extent, rather than by the efficiency, of popular control; and, while there must always be an important element of value in any factor which aims to safe-guard the responsibility of Government to those governed, this fundamental doctrine is at war with the plan of the Republic, and, more often than not, it is at war with the very interests it presumes to promote.

The true measure of democracy, in a representative Republic like ours, is not the sheer "quantity" of direct power that can be placed with mass-citizenship: it is the "quality" of popular authority—the efficiency of the control—which fixes the utility of the forms of Government. Forms are justified only by their results. If too many cooks spoil the broth, it is no advantage to the broth to multiply the cooks, no matter how much those who believe in the exclusive efficacy of numbers may theorize to the contrary. We do not need more Law-makers; we need better

ones: and this emphasis upon the "quality" of results, rather than upon the "quantity" of agents, is the very genius of enlightened and progressive Government. Up to a certain point, numbers are necessary to safety "in order to guard against the cabals of a few": beyond this point, mere numbers are a menace, because of "the confusion of a multitude," and—even more pertinent—because unwieldy masses lend themselves to easy exploitation.

The fallacy of trying to measure the efficiency of democracy by mere bulk is no more strikingly illustrated than in a candid study of the size of the House of Representatives, where the constant increase in membership has now reached such a chaotic point that practical legislative necessity has delivered the House into the hands of an absolute political oligarchy, with the inevitable result that the average member possesses neither individuality nor representative power. His constituents, by the same token, share the same fate. So does this thing we call "democracy."

It is obviously impossible, in a work of this limited scope, to analyse the whole field of error contingent upon the notion that all safety is in numbers. But the case of the House is so strikingly illuminating—and so typical of a false doctrine's fruits—that it may be dissected as a moni-

tory cross-section of the whole problem, and as conclusive proof that the advice of the Founders of the Government is as sound and as constant in its values to-day as it was in the formulative era when the true and correct philosophy of a representative Republic was first given to the world.

As a basis for these contemplations, let the following doctrine from *The Federalist*<sup>1</sup> be borne constantly in mind:

“In all legislative assemblies, the greater the number composing them, the fewer will be the men who will in fact direct their proceedings. . . . The people can never err more than in supposing that by multiplying their representatives beyond a certain limit, they strengthen the barrier against the government of a few. Experience will forever admonish them that, on the contrary, AFTER SECURING A SUFFICIENT NUMBER FOR THE PURPOSES OF SAFETY, OF LOCAL INFORMATION, AND OF DIFFUSIVE SYMPATHY WITH THE WHOLE SOCIETY, THEY WILL COUNTERACT THEIR OWN VIEWS BY EVERY ADDITION TO THEIR REPRESENTATIVES. The countenance of the government may become more democratic, but the soul that animates it will be more oligarchic. The

<sup>1</sup> No. 58.

machine will be enlarged, but the fewer, and often the more secret, will be the springs by which its motions are directed."

These pronouncements are as true in 1923 as they were in 1787. It is a popular thing—it is supposed to be a "progressive" thing—to shout for a greater "quantity" of democracy in America. But as the "quantity" increases, the "quality" decreases, and, therefore, the real advantage of democracy is hurt, not helped. Let us see what the record shows, in relation to the size of the House.

The determination of the proper size of the National House of Representatives has always been a bone of desperate political contention and gerrymander. Every time the decennial census has produced the arithmetic upon which Constitutional re-apportionment must be based, Congress has solemnly debated the problem in the light of the public welfare, and then just as solemnly settled it with an eye to the least possible disturbance of the political fortunes of the sitting gentlemen. Never but once has a re-apportionment Law reduced the size of the whole House<sup>1</sup> and this was upon the initiative of a Senate amendment. Ordinary practice has left the House to order its own

<sup>1</sup> Act of June 25, 1842.

destiny, and destiny, as a result, usually has first seen to it, in recent years, that the House should be of such a size as not to rob any sitting member of his seat, regardless of the extent to which the total membership has had to be increased to achieve this purely personal advantage.<sup>1</sup> As a result of this tendency the size of the House has been steadily increasing.

The Constitution launched the House with a total membership of 65—a ratio of one Congressman to every 30,000 population.<sup>2</sup> The federal

<sup>1</sup> In connection with the re-apportionment resultant from the 1920 census, the first report from the Census Committee, 66th Congress, 3rd Session, January 8, 1921, recommended a new population ratio of 218,986 for each representative so that "under this apportionment, no State will lose a member." The same Committee, 67th Congress, 1st Session, July 29, 1921, reported a ratio of 228,882, under which the only losses in membership would have been one Representative each from Maine and Missouri.

<sup>2</sup> Upon this score it is interesting to note what *The Federalist*, No. 55, had to say: "The number of which this branch of the Legislature is to consist, at the out-set of the Government, will be sixty-five. Within three years a census is to be taken, when the number will be augmented to one for every 30,000 inhabitants; and within every successive period of ten years the census is to be renewed, and augmentations may continue to be made under the above limitation. It will not be thought an extravagant conjecture that the first census will, at the rate of one for every 30,000, raise the number of Representatives to at least 100.

census has been taken fourteen times since then, and, with the single exception noted above, each census has been followed by an increased House membership.<sup>1</sup> The ratio of population to be represented by one Congressman has increased in each one of these stages, as follows: 1790, 30,000; 1800, 33,000; 1810, 35,000; 1820, 40,000; 1830, 47,700; 1840, 70,680; 1850, 93,423; 1860, 127,381; 1870, 131,425; 1880, 151,911; 1890, 173,901; 1900, 194,182; 1910, 211,877. But while the ratio has thus increased from decade to decade, consonant with the growth of the country, so also has the total membership of the House increased, because the former ratio has not kept pace with the latter growth. The result has been a total membership of the House, in each of these decades as follows: 1790, 105; 1800, 141; 1810, 181; 1820, 213; 1830, 240; 1840, 223; 1850, 234; 1860, 243; 1870, 293; 1880, 325; 1890, 356; 1900, 386; 1910, 435.

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. . . At the expiration of twenty-five years, according to the computed scale of increase, the number of representatives will amount to 200; and of fifty years, to 400. This is a number which, I presume, will put an end to all fears arising from the smallness of the body." The first and the third censuses practically justified these prophecies, although it took 120 years to reach the final figure indicated.

<sup>1</sup> The re-apportionment pursuant to the 1920 census has not been agreed upon, as this is written.

The result is that the size of the House today is a menace to its own efficiency and to its own democracy; and unless courageous, political unselfishness soon puts metes and bounds to this elephantiasis, what is now a deadly disease will graduate into fatal malady. The House already is so big, and so burdened with the infirmities of its own size, that it is a "deliberative" body in name only. The orator who still glorifies it, in the intoxication of spread-eagle apostrophe, as "the greatest popular assembly, etc., etc.," is talking just plain unadulterated buncombe. The truth is that the House, by decennially multiplying its own encumbrance, has had to yield all pretense of independent, deliberative, representative consideration of public problems. Long since, they had to take the individual desks out of the hall of the House, and squeeze the members onto benches. While it was a purely physical expedient which recommended this change, it was a prophetic sort of thing after all—for why should the average, modern, House member have such a thing as a desk on the floor of the House, a desk or any other appurtenance conveying the suggestion of a real participation in the movements of a parliament which is as completely in the hands of a few bosses, backed by a few puissant rules, as if its membership

were 35 instead of 435, and the ratio of representation 3,000,000 instead of 211,000? Nor is there legitimate reason for one who consents to the size of the House, to complain against "bosses" and "rules," because, without them, the despatch of public business would be all but impossible. Imagine freedom of debate among 435 statesmen, dealing with hundreds and thousands of Bills! It would consume nine eight-hour days to permit each member to make a ten-minute speech on one subject! And statesmen are not given to ten-minute speeches. It takes so long to even call the roll of the House, that mechanical registering devices are being sought to expedite the process of compiling a simple "yes" or "no" from each member of the throng. In other words, here is a shining example of "quantitative" democracy; and here is the exact evolution against which *The Federalist* warned.

Each time the basis of apportionment has to be changed, we hear the same old, thinly veneered arguments—how it is wise "for the sake of democracy" to keep this great, representative body "close to the people"—how this is the only means left, as the country continues to grow, for guaranteeing the legislative dominion of the people. But each time the size of the House is increased in

response to these considerations, the considerations themselves become the more desperate and the more endangered. Hon. Theodore E. Burton of Ohio, after a membership in the House under four apportionments, declared that the one out-standing thing which has impressed him, with each increase in the total membership, has been "the diminished prestige of the House and the diminished standing of the individual member."<sup>1</sup> That this candid verdict is the truth, is the only conclusion honesty can attest. The ratio of diminishing prestige and utility will continue to slide toward zero in proportion as the House continues to vote itself into the inevitable impotence of unhealthy and unmanageable expansion. And where will it all end—this fallacy that "numbers" alone can spell the salvation of democracy? Unless some Congress comes along, with an adequate understanding of the correct, historical basis of representation in a Republic, and with the courage to vote a few of its own members out of their Congressional jobs, it is only a question of time before the House roll-call will approach a thousand names, and the normal Congressman will be little more than a sublimated Washington messenger boy for his constituents.

<sup>1</sup> House Hearings, June 27, 1921, House Document, p. 19.

Somewhere, somehow, sometime, some decennial Congress must make the break that shall save the House from fatty degeneration of the heart. It makes no difference, though it is a favorite argument, that the popular branch of many foreign parliaments is more numerous than our own.<sup>1</sup> These foreign parliaments function differently from our own. Ordinarily the prevailing Ministries are chosen from among them, and the Ministry is the essential expression of the parliament. Our Cabinet, our Administrators, have no relationship to Congress—and should have none, unless and until we are prepared to abandon our Constitutional checks and balances. Our problem stands on its own legs and must be judged by exclusively American standards. “The membership of the House cannot be increased indefinitely. A stop must be made sometime,” read the minority report of the Census Committee in the 67th Congress, “and in our opinion no time will ever be more opportune than the present, for we believe a point has been reached where increased membership will result in decreased efficiency.”

<sup>1</sup> The United Kingdom, under the 1911 census, had 707 members in the House of Commons. Under the 1919 census, France had 626 members in the House of Deputies. Italy has 508, Spain, 417, Germany 423 members in the lower House.

Certainly it is provably true that increasing the size of the House from time to time, has done exactly what *The Federalist* prophesied—the countenance of the Government may be more democratic, but its soul is more oligarchic—and certainly the enlargement of the machine has resulted in “fewer and more secret springs by which its motions are directed.”

The House to-day pretends to be composed of 435 members. But to all practical intents and purposes, it could more truthfully be said to be composed of the five gentlemen who comprise the majority of the Republican majority of the Committee on Rules. The House itself, of course, is so large that every motion made by its complex machinery must be in perfect harmony with some constricting rule. If there is no regular standing rule to fit the occasion, a special rule is created for the emergency. But always there is a rule—and the source of these rules is pretty nearly the fountain-head of real Congressional control. The Rules Committee is composed of twelve members—eight belonging to the majority party, four to the minority. It is the most powerful Committee in the Capitol, and it holds the power of a Czar in respect to legislation. This Committee could, if it wished, practically prevent

important legislation by refusing to report out a special rule giving such legislation right of way. It can, to all intents and purposes, protect measures against amendment. It can, so long as party discipline holds its party colleagues in line, practically designate the fate of any measure. Take tariff legislation as an example—the initiation of all revenue Laws being the most important as it is the exclusive Constitutional prerogative of the House. Specifically, take the Fordney Tariff Bill of 1922 as an example. It was framed by the seventeen Republican members of the Ways and Means Committee, in executive session. As the rules of the party caucus apply very strictly to all of the members of the Ways and Means Committee it can be safely stated that nine Republicans controlled the actions of the Committee. Thus was the Bill framed and reported to the House. With it came a special rule from the Rules Committee under which amendments to the Bill that should be offered from the Ways and Means Committee took precedence over all other amendments; and, of course, there also was the familiar provision to limit the time of debate. It was not possible, when the Bill got into the House to read the entire Bill for Amendment under the standing five-minute rule, and as the Committee had not

exhausted its own amendments before the total time provided had expired, all members of the House, other than Committeemen, were foreclosed from any opportunity to actually participate in the making of the Bill. They could vote upon such propositions as the rules permitted to be presented; but even this balloting privilege was strictly confined to such questions as the Managers, under the rules, deigned to submit to the House. As for discussion, there was a form of limited and wholly futile debate: but even this shadow of a privilege amounted, for most of the members, to nothing more than a "leave to print" undelivered speeches in the *Congressional Record*. In a word, the Fordney Tariff Bill was the work of nine men who composed a majority of the Republican majority of the Ways and Means Committee and five men who composed a majority of the Republican majority of the Rules Committee. It reflected the judgment and purpose of fourteen—not 435—members of Congress. Nor was it any different in this respect than is any other piece of important legislation. While the rules of the House theoretically provide an opportunity for elastic legislation, the physical necessity for close management in order to get business done in so numerous a body, reduces the practical aspects of this opportunity near to

nothing. Was *The Federalist*, as already quoted, right or wrong, when it said: "In all legislative assemblies, the greater the number composing them the fewer will be the men who will in fact direct their proceedings"? Nor is it amiss to add this further observation from this same prescient source<sup>1</sup>: "A few of the members, as happens in all such assemblies, will possess superior talents; will, by frequent re-elections, become members of long standing; will be thoroughly masters of the public business, and perhaps not unwilling to avail themselves of those advantages. The greater the proportion of new members, and the less the information of the bulk of the members, the more apt will they be to fall into the snares that may be laid for them."<sup>2</sup>

There is still an epilogue to this drama—this

<sup>1</sup> *The Federalist*, No. 53.

<sup>2</sup> *The Searchlight*, Vol. VII., No. 3, issue of August 31, 1922, said regarding the initial passage of the Fordney Bill through the House: "Congressmen could talk, and did for several days. There was some freedom of debate, but that did not extend to individual opportunities to alter and amend. July 21, 1921, was the time fixed for the final passage of the Bill. Therefore, on that date, after less than two weeks of gag ruled consideration, the House passed the measure. . . . The House has completely broken down as a deliberative body. Average members, so far as real influence is concerned, are mere dummies. A few bosses possess and exercise all the power that counts."

farce of democracy attained through reliance upon numbers. The Senate debated for four months what the House had tossed off in two weeks. It put 2,500 amendments on the Fordney Bill. When the Bill came back to the House it was promptly sent to "Conference"—meaning that it was given to a joint Committee consisting of three Republican and two Democratic Congressmen, and three Republican and two Democratic Senators. It was their function to "reconcile" the "differences between the House and Senate." The six Republican "reconcilers" locked their door upon the four Democratic "reconcilers" and upon the public. Do you remember *The Federalist* warned that the "springs" controlling too large a legislative machine would become not only few but "often secret"? Here enter both elements. Six men—these joint conferees—finally wrote the real Fordney-McCumber Tariff Law and wrote it behind bolted doors. The results of their compromises came back to the House under another special rule which again precluded effectual inspection or dissection vote. What fourteen men began, three completed—so far as the House of Representatives was concerned. And this is the regular, typical routine.

Legislation which is perfected by the few, and

rubber-stamped by the many, is not necessarily and automatically bad because of its narrow genesis. On the contrary, the long public experience of the men who reach these key-positions, and the double responsibility which rests upon them because of their vantage, might factor for better rather than for worse. It is a compliment to the fidelity and good purpose of its Managers that the House ordinarily serves useful ends. Certainly the good conscience of a vast majority of the men who sit in the Congress is entirely above reproach. But these are all ulterior considerations. Our present examination is confined to the proposition that the mere multiplication of the agents of Government does not spell more effectual democracy—in other words, that the measure of democracy is not a mere matter of numbers—and the record and experience of the House of Representatives are unanswerably in point. Indeed, when one realizes how thoroughly undemocratic the House has made itself by the constant expansion of its numbers, the wonder is that the House succeeds, in useful legislation, as well as it does.

Occasionally, through the years, sporadic insurgency develops into revolt against Congressional servitude. But its attack is always upon the method of control, rather than upon the fact of

control itself. There are no more "Czar" Reeds or "Czar" Cannons—statesmen as magnificent as they were powerful. The Speaker of the House has been shorn of his imperious sceptre. But the transition merely trades new kings for old. Control has slightly broadened to permit authority to a few more than one: but it is still the same old control, involving the same old servitude. It is impossible for the House to escape the incubus of numbers. Times change, but there are certain principles of Government that remain constant. It is human nature that freemen should be perpetually in quest of greater efficiency and greater democracy in their public affairs; but they always err when they suppose it possible to avoid these elementary laws of Government. Beyond a reasonable and practical point, there is no safety and no utility in numbers. The House is enslaved through the necessities created by its own over-growth. When it becomes smaller, it can become more democratic. As it continues, on the other hand, to become larger, it will become more oligarchic.

In the days of the beginning, Americans had to be persuaded that the need for "an actual representation of all classes of the people, by persons of each class, is altogether visionary,"<sup>1</sup> and that any

<sup>1</sup> *The Federalist*, No. 35.

such scheme would make the representative body "far more numerous than would be consistent with any idea of regularity or wisdom in its deliberations."<sup>1</sup> Modern Americans, for identically the same reason, must be persuaded that the need of numbers, for the sheer sake of numbers, is a treacherous delusion which defeats its own aims. Numbers, beyond a certain practical point, impair efficiency.<sup>2</sup> Numbers, beyond the limit necessary "to guard against too easy a combination for improper purposes," impair resultful democracy. Numbers, after the maximum of utility is reached, either make for "the confusion and intemperance of a multitude"<sup>3</sup> or for the dominion of a few adroit and persuasive and not always scrupulous exploiteers.<sup>4</sup>

<sup>1</sup> *The Federalist*, No. 36.

<sup>2</sup> When the Supreme Court was enlarged, Justice Story wrote, at the end of the 1838 term: "You may ask how the Judges got along together. We made very slow progress and did less in the same time than I ever knew. The addition to our number has most sensibly affected our facility as well as rapidity of doing business. . . . I verily believe, if there were twelve Judges, we should do no business at all, or at least very little."—*Life and Letters of Story*, by William Waldo Story, II., 296.

<sup>3</sup> *The Federalist*, No. 55—"Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."

<sup>4</sup> *The Federalist*, No. 59—"It will always multiply the

If Hamilton were here to-day, there is no doubt what he would say to the modern House of Representatives if it consulted him in regard to re-apportionment, as the Congress of his own time besought his wisdom upon almost every question under the sun. There is no doubt what the sound, basic philosophy of the American form of Government recommends. We privately confess an opinion that we are sacrificing efficiency to size, but we publicly continue to pursue the course of least resistance. The words of *The Federalist*, as we have here renewed them, wise in their day, even wiser in their prophecy, should be read on the floor of Congress upon every future decennial occasion of a re-apportionment.<sup>1</sup> The House must be reduced in size, if it is to be restored to a representative agency of Government that can function democratically.

Such are the results of a laboratory test upon the size of the House of Representatives, as a specimen of the hollow doctrine that the true measure of democracy, in the Republic, is a matter solely of “quantity” of popular power. Any doctrine

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chances of ambition, will be a never failing bait to all such influential characters as are capable of preferring their own emolument and advancement, to the public weal.”

<sup>1</sup> *The Greatest American*, by Vandenberg, 160.

which ignores or denies the real fundamentals of American Government, is bound to come to just such baneful grief. These "quantitative democrats" make their initial mistakes when they forget the theory of popular control in a Republic.<sup>1</sup> "The important thing first to be learned is that in this democracy the Government is in form a Republic, because the Laws are enacted and enforced, not by the direct vote of the people but by the representatives elected by the people."<sup>2</sup> Popular control, in the Republic, is exercised through these representatives. The very act of choosing representatives is an acknowledgment of the American purpose to try to escape the infirmities incidental to mass-decisions. If the country was too large for mass-decision when it had some 2,000,000 population at the time of the adoption of the Constitution, how astoundingly absurd to pretend that we are not too large for mass-decisions when there are 100,000,000 of us! If the representative theory was sound then, it is not only sound but fifty times as essential now. To accept the representative theory, is to abandon the mass-

<sup>1</sup> "A Republic may be defined as a state in which the sovereign power rests in the people as a whole, but is exercised by representatives chosen by popular vote."—*Cyclopedia of American Government*, III., 188.

<sup>2</sup> *The Short Constitution*, by Wade and Russell, 41.

decision theory—the notion that the safety of our democracy is dependent upon numbers—and any attempt to co-mingle the two theories, in practice and evolution, is an illogical and dangerous perversion. It is exactly such a mixture when the representative theory establishes a House of Representatives, and the mass-decision theory insists upon multiplying the House into a mob. The need—the reform recommended by any sympathetic understanding of the Constitution—is for FEWER Congressmen so that they may be MORE representative; and then the sovereign power of the people must be exercised in holding these agents to stricter accountability for their acts.

“Quantitative democracy” is a false beacon in every American respect. It is hostile to the theory upon which American Government was erected. It is contrary to the best practical results—no matter how superficially attractive the suave advocate may make it. If representatives of the people betray their trust, if they fail to serve the popular will, it is a vastly better remedy to eject the false proxies and choose new and more responsive agents pursuant to the representative theory, than it is to invoke the so-called “initiative,” pursuant to the mass-decision theory, and thus attempt to make a Legislature out of the whole

people. In the hey-day of this "initiative" fad, there have been ballots submitted to the electors containing so many "initiated" laws that it would require four hours of close attention to even read the propositions submitted for plebiscite. In one State, at one time, there was a ballot exactly the size of the massive double-doors on the Capitol building. These are not the methods for obtaining the best ordered statutory results. They are not the methods contemplated by the Founders of the Government. They are inimical to the American system. The notion that we must rely upon numbers in order to be safe is effectually exploded by a study of the vicissitudes of the House of Representatives. It is equally faulty when applied to any other phase of American public affairs. This Government stands on the theory of popular control through adequate and trust-worthy representatives. It is the business of mass-decision to see that these representatives adequately function—not to take functions out of their hands or to multiply them to the point of impotence. As *The Federalist*<sup>1</sup> said, we repeat that "the security to the society must depend on the care which is taken to confide the trust to proper hands, to make it their interest to execute

<sup>1</sup> No. 66.

it with fidelity, and to make it as difficult as possible for them to combine in any interest opposite to that of the public good."

The "fundamental maxim of Republican Government," declared this greatest of all expositions of the American system<sup>1</sup> "requires that the sense of the majority should prevail." But how shall it prevail? "The whole power of the proposed Government is to be in the hands of the REPRESENTATIVES of the people. This is the essential, and, after all, only efficacious security for the rights and privileges of the people, which is attainable in civil society."<sup>2</sup>

<sup>1</sup> *The Federalist*, No. 22.

<sup>2</sup> *Ibid.*, No. 28.

## The Safety Valve

“In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion, and the jarrings of parties in that department of the Government, though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection, and serve to check excesses in the majority.”—*The Federalist*, No. 70.

“The oftener a measure is brought under examination, the greater the diversity in the situation of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.”—*The Federalist*, No. 73.

PERHAPS the most familiar and persistent of all encroachments, born of these impatient times, is the constantly reiterated proposal either to curb the authority of the Senate of the United States, or to eliminate the Senate entirely as a department of American Government. It is a glib text for the sophist to promote. That department upon which the Constitution premeditatedly puts the burden of stopping hasty, headlong legislation, may be easily recommended to the displeasure of citizens

who are disinclined to brook the slightest delays—even for purposes of effectual examination—in the attainment of immediate objectives. But if Hamilton were here to-day, to re-interpret the genius of the Constitution and to bespeak the admonitions of the Founders, he would not compromise so much as one iota with these refractory mutineers who neglect to realize that “haste makes waste” in legislation as in life, and who ignore the palpable fact that all semblance of resultful deliberation would depart from our American parliament if the Senate were reduced to impotence. If there is one principle more than another upon which *The Federalist* laid down unimpeachable logic, it is in the decisive argument defending the function of the Senate; and every proposition which it advanced in theory, time has vindicated in practice.

The method of electing Senators has changed. Choice by direct vote of the people is substituted for choice by the Legislatures of the States. We pass the question whether this has improved the Senate's personnel. At least, it has brought the Senate one step closer to popular control and makes for a direct, popular responsiveness—a thing against which there most certainly is no prejudice in the Constitution. The Founders, because of their

earnest conception of the exalted necessity for some such "safety valve" on Government as the Senate represents, might have hesitated to weaken any of the barriers against impetuosity, if they could have been consulted when this reform impended. They were constantly thinking of Governmental derelicts, all down the shores of history, broken on the rocks of passing passions, and on the reefs of shifting uncertainties.<sup>1</sup> But they would have readily yielded to any Constitutional Amendment passed in the ordered way; and—this is sure—they would not have considered the mode of the election of Senators so important as a scrupulous preservation of the unadulterated functions which the Senate itself was created to serve. Furthermore, since the form of election has been changed—bringing Senators in direct electoral contact with their constituents—they would have been strengthened in this latter position, because, with the creation of this direct electoral responsibility, all legitimate chance for

<sup>1</sup> *The Federalist*, No. 9—"It is impossible to read the history of the petty Republics of Greece and Italy without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions by which they were kept in a state of perpetual vibration between extremes of tyranny and anarchy."

argument that the Senate constitutes an unapproachable, undemocratic aristocracy of power has disappeared. But all the emphasized reasons for the Senate's preserved independence impossibly remain—even more profound in their challenge than they were when the Constitution was written and when *The Federalist* presented its unanswerable defense.

A favorite form of attack upon the modern Senate is an indictment of its freedom of debate. Demands for cloture in the Senate are a familiar phenomenon. Indeed, the Senate rules recently compromised with this perennial propaganda, to the extent of permitting the Senate to vote itself into some limitations in this direction. If this tendency gains strength, however, and shall ever ultimately take from the Senate its traditional prerogative to illuminate and ventilate all public questions, practically without limit, one of the most essential guaranties for safe, sound, and truly representative Government will have been swept to the discard. We have seen, in the preceding chapter, how real democracy has broken down in the House; how constricting rules have delivered legislation, in the House, into the hands of a few. The chief agency through which this break-down has been accomplished is limitation of debate.

We have seen how, in so vital a thing as a great tariff law, consideration by the whole House has become little more than a perfunctory gesture. In thirteen days, the Fordney-McCumber Bill was jammed through the lower branch of Congress. It had but the shallowest pretense of deliberative attention. It was passed as framed and ordered by its authors. Because of the size of the House, it had to be passed in that fashion or no Law, involving such a multiplicity of considerations, could have been passed at all. But! In the name of sanity, should there be no forum whatsoever in which a full and a free discussion can disclose and excise, if such be the legislative disposition, the rotten spots in these statutes of far-reaching portent? Should the Senate similarly be gagged and bound by rules which shall deliver the complete process of law-making in America, to the mandate of the select few who hold the reins of power wherever these chains are forged against freedom of legislative action? For four months, from April 20 to August 19, 1922, the Senate gave the Fordney-McCumber Bill its almost undivided attention. Senators—all of them—were free to attack or defend any provision in it. Senators—all of them—could offer Amendments for the consideration of the Senate. The Bill was practically re-writ-

ten.<sup>1</sup> Whether it was improved, is beside the point. At least, it was put under microscope and search-light. At least, the process of debate enlightened the country as to what the Bill contained. At least, there was representative action and deliberative action. At least, the Senate adopted some 2,500 Amendments, some of them fundamental; and the retention of most of these Amendments in the Bill as finally approved in both Houses, permits the inference that they spelled improvement and advantage.

Would it be advisable to shut off this search-light, and to discard this microscope? It is understandable that there should be irritation when Senators take advantage of this freedom of debate and wander off into interminable political platitudes wholly beside the point: but, for the sake of controlling this inconsequential wind, is it wise to invite the infinitely greater and more serious

<sup>1</sup> *The Searchlight*, vol. vii., No. 3, issue of August 31, 1922, says, in this connection: "The boss system in the House is so arrogant, so over-developed, that the House has completely broken down as a deliberative body. The Senate knows this condition. It pays little more attention to the form of measures coming from the House than it would to the work of ten-year-old children. The Senate re-writes even those Bills which the Constitution requires shall originate in the House about as completely as though the lower branch did not exist."

irritation that would come to the country if it sanctioned a hard-and-fast Senate cloture which would deliver Senate destiny into the hands of those who made and administered its rules? It is understandable that there should be irritable protest from the country when the Senate dallies in emergency, and seems inexcusably slow in taking obviously necessary steps. But is it not better to hold dilatory Senators to account to their constituents upon electoral days of reckoning, than to strike down the only barriers left to retard bad, as well as good, legislation?

In the convulsive push for "progressivism"—a political habit into which this "speed age" has plunged the twentieth century—many citizens have become disciples of change simply for the sake of change. They are iconoclasts. There is a current restlessness which seems to subscribe to the notion that whatever is, is wrong, and that any alternative must be for the better. The direct nomination and election of Senators has encouraged this trend. It has emphasised individualism in our politics. Candidates have felt the necessity of attracting an attention which regularity and Constitutionalism illy serve. In order to be different, they become recalcitrant. The need for an issue, in order to justify a candi-

dature, results in the creation of fictitious issues. In order to seem to be "progressive," there is an inclination to be destructive of the established institutions. Often it seems to be a case of anything to catch the public eye and hold the public ear—and the revolutionist can always attract a bigger crowd than the conservator of established forms. It is in this field of weltering ambitions that the Senate's freedom of debate is most violently pilloried. It is a fine text for a hot speech—if the speaker cares not what he says. But it is not "progressivism," no matter what livery it pretends to wear. It is "reactionism" of the deadliest sort. If the turbulent proponent of such doctrine would give himself a second thought, he would readily see the pathetic inconsistency of his own position. In one breath, he damns the "gag rules" of the House—this is his constant stock in trade: and in the next breath, he damns the Senate for lack of "gag rules"! No wonder the Fathers of America thought that their Government needed a safety valve!

Probably it will be conceded that Senator William E. Borah of Idaho is the outstanding "progressive" in the present Congress. Senator Borah says: "I should regard a limitation on debate in the Senate as reactionary to the last

degree. There is no protection for the public in these days except in the fullest senatorial debate." That should end for-keeps any mistaken idea that it is "progressive" to throttle down the only free forum left in the American system of Federal government. With Hamilton and Borah in accord on this proposition—at the two extremes of a century of American experience—there is precious little meritorious argument left to defend a counter posture. Under such circumstances, could anything read a more earnest warning to the average citizen, reminding him of the danger of snap judgments based upon insufficient information, than the easy inclination of this same average citizen to fall in with the heretical idea that the Senate's freedom and independence are a menace to democracy?"

Senator Borah adds this thought: "It is just as much the duty of the Congress of the United

<sup>1</sup> United States Circuit Court Judge William S. Kenyon of Fort Dodge, Iowa, while a member of the Senate was one of its soundest and thoroughly progressive members. He was generally looked upon as a progressive leader. "While a member of the Senate," declares Judge Kenyon, "I was opposed to changing the rules which allowed free and unlimited discussion. While it may at times be abused, it would be much worse to abandon this right of free speech. I have not changed my opinion since leaving the Senate."

States to inform public opinion as it is to frame statutes." Information is served only through untrammelled debate. The country, pre-occupied with its own material affairs, knows little enough of its own public affairs, at best. If it had to depend upon the gagged House of Representatives for information, it would get even less than is its existing limited appropriation. The country has learned more about its own problems as a result of Senate debates, invariably reported liberally in the American press, than through any other source. "It is a misfortune," said *The Federalist*,<sup>1</sup> "inseparable from human affairs, that public measures are rarely investigated with that spirit of moderation which is essential to a just estimate of their real tendency to advance or obstruct the public good; and that this spirit is more apt to be diminished than promoted by those occasions which require an unusual exercise of it." In other words, we are prone to jump at conclusions. The whole people, when adequately informed upon a public problem, can always be safely left to a majority verdict; and rarely will they go wrong. But the "adequate information" is pre-requisite. Unquestionably it is the duty of Congress to lead in this informative process. The

<sup>1</sup> No. 37.

Senate, under existing circumstances, must be the principal forum in which this obligation is served. And who shall say that there are not occasions when, first, the power of the Senate to prevent precipitous decision, and, second, the opportunity of the Senate to better inform the country upon the merits of the matter in issue, have not saved the country—and will not save it again—from summary actions which it would later regret? Assuming, for example, that the unprecedented electoral majority won by the Republican party in November, 1920, reflected the country's over-whelming approval of Republican refusal to project the United States unreservedly into a League of Nations, the Senate's freedom of debate—and that alone—must be credited with delaying the country's initial, head-long eagerness to rush into the League, then with informing public opinion to an extent which ultimately brought a profound reversal in attitude, and, finally, in saving the Nation from a step which it would have lived to regret in sack cloth and ashes. The merits of the League of Nations have nothing to do with this contemplation. Whether we should or should not have entered, is beside the point. The point is that the country, rightly or wrongly, reversed itself when the subject was wholly ventilated; and

it would never have been ventilated if the Senate had not been an untrammeled body. There is a school of thought—catering to the passion rather than the sense of those cajoled—which loves to pretend that the people, even in their sudden inclinations, never err. This is absurd. It is demagogery. There is always chance for error where there is lack of opportunity for information. It is no reflection upon democracy to admit this truth—any more than it is a reflection upon a man's eye-sight to say that he cannot see in the dark.<sup>1</sup> Once provided with full information, the majority opinion of the people of the United States will rarely err. If it does, under such circumstances, it is a fatality, incidental to democracy, which must be accepted. But if the Senate provides a "Stop! Look! Listen!" semaphore—at least serving to prevent the unnecessary fatality of uninformed error—is it not as invaluable and as indispensable as the kindred warning signals which

<sup>1</sup> Senator Henry Cabot Lodge, opposing the initiative, said in a Boston speech in 1907: "Suppose I say to you that I do not think you can read in the dark. Do I thereby imply that your eyes are bad or that I think you are illiterate or ignorant? Because I say that you cannot read in the dark, am I therefore to be accused of exhibiting distrust in your intelligence or your education? . . . What I distrust and assail as a barrier to reading is the darkness. In order to read you must have light."

line the highways of the Nation to protect our physical lives in like danger? Does not candor compel acquiescence when *The Federalist*<sup>1</sup> says:

“The republican principle demands that the deliberate sense of the community should govern the conduct of those to whom they intrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests. It is a just observation that the people commonly INTEND the PUBLIC GOOD. This often applies to their very errors. But their good sense would despise the adulator who should pretend that they always REASON RIGHT about the MEANS of promoting it. They know from experience that they sometimes err; and the wonder is that they so seldom err as they do, beset, as they continually are, by the wiles of parasites and sycophants, by the snares of the ambitious, the avaricious, the desperate, by the artifices of men who possess their confidence more than they deserve it, and of those who seek to possess rather than to deserve it. When occasions present themselves, in which the interests of the people are at

<sup>1</sup> No. 71.

variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection. Instances might be cited in which a conduct of this kind has saved the people from very fatal consequences of their own mistakes, and has procured lasting monuments of their gratitude to the men who had courage and magnanimity enough to serve them at the peril of their displeasure."

The Senate was created to serve, among other essentialities, this stability and this security; not to bar the mature, enlightened, deliberate judgment of the people, but to bar the perversities of undigested, snap conclusions. The Federal Legislature, without a Senate thus functioning, would be like an automobile that is all accelerator and no brake. Traffic Laws, for the motorist, invade pure freedom; but they are indispensable to safety. The legitimate functions of the Senate, in relation to legislation, are no different.

Some irrational critics would abolish the Senate entirely.<sup>1</sup> Some thoroughly earnest and sustained

<sup>1</sup> The National Platform of the Socialist Party adopted at Indianapolis, May 16, 1912, demanded "the abolition of the Senate and of the veto power of the Presidents."

students would delimit certain of the Senate's affirmative powers—as, for instance, its two-thirds vote upon the ratification of treaties, which, according to this view-point, renders it too difficult for an Administration to rush us into international contracts. Still others would emasculate the general rules of Senate conduct, so as to more nearly reduce the senatorial personality to the impotence suffered by individual statesmen in the other and lower House. But comprehensive Americans, sensible of history, experience, and the necessities of our representative system of Government, will yield to none of these. The pretended advantages claimed for any or all of these reforms, are as nothing compared with the menace meditated against the public weal.

This does not mean that the Senate is sacrosanct. If Hamilton were here to-day, there undoubtedly are many phases of Senate ritual which would challenge his hostility. For instance, one can well imagine how this tremendous man, who was a pivotal member of the Constitutional Congress at the age of twenty-five, who was the heroically dominant factor in the New York Constitutional Convention at the age of thirty-one, and who, at the age of thirty-two, was the master craftsman in the first cabinet of President Washington; one

can well imagine, we repeat, how Hamilton would scorn the Senate's "seniority rule" under which length of service, regardless of quality of talents, dictates the filling of key-chairmanships, and under which youth, regardless of its capacity, is foreclosed from leadership.<sup>1</sup> On the other hand, youth, without capacity or without experience, would no more win his applause than would maturity which failed to develop capacity out of experience. In other words, he unquestionably would look askance at any rigid formula which denied the country the maximum benefit of senatorial merit.

The Senate is not sacrosanct. In its membership to-day, Hamilton might look in vain for a preponderance of the sturdiest and ablest men of the time, finding the rule of his day now proven by its exceptions. But, regardless of moot incidents, he would uncompromisingly demand unswerving fidelity to the basic functions which the Senate serves; and he would present an iron opposition to all insidious efforts, no matter what their guise or pretense, to make the Senate less formidable in its essential prerogatives. In a word, he would con-

<sup>1</sup> The average age of the entire membership of the Convention which framed the Federal Constitution was 43½ years.—*The Short Constitution*, by Wade and Russell, 71.

tinue to stand for the theory of the Constitution. "In every governmental process," said Theodore Roosevelt,<sup>1</sup> "the aim that a people capable of self-government should steadfastly keep in mind, is to proceed by evolution rather than revolution." This is to say that a people capable of self-government, will always proceed inside—not outside—the Constitution and its theory and its purposes; also that it is often as fatal to deny the Constitution in spirit as in letter.

Never has the plain, convincing logic of *The Federalist*<sup>2</sup> been excelled in its exposition of the functions and the necessities of an independent, untrammeled Senate in the American scheme. Those impatient souls which incline to rebel against this branch of Government, would do well to linger upon these sagacious words, as applicable, in every phrase and phase, to the conditions of to-day as to the nascent era of our history.

"First. It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch

<sup>1</sup> Speech at Wheeling, West Virginia, September 6, 1902.

<sup>2</sup> Nos. 62 and 63.

of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security of the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient. This is a precaution founded on such clear principles, and now so well understood in the United States, that it would be more than superfluous to enlarge on it. I will barely remark, that as the improbability of sinister combinations will be in proportion to the dissimilarity in the genius of the two bodies, it must be politic to distinguish them from each other by every circumstance which will consist with a due harmony in all proper measures, and with the genuine principles of republican government.

“Secondly. The necessity of a senate is not less indicated by the propensity of all single and numerous assemblies to yield to the impulse of sudden and violent passions, and to be seduced by factious leaders into intemperate and pernicious resolutions. Examples on this subject might be cited without number; and from proceedings within the United States, as well as from the history of other nations. But a position that will not be

contradicted need not be proved. All that need be remarked is, that a body which is to correct this infirmity ought itself to be free from it, and consequently ought to be less numerous. It ought, moreover, to possess great firmness, and consequently ought to hold its authority by a tenure of considerable duration.

"Thirdly. Another defect to be supplied by a senate lies in a want of due acquaintance with the objects and principles of legislation. It is not possible that an assembly of men called for the most part from pursuits of a private nature, continued in appointment for a short time, and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust. It may be affirmed, on the best grounds, that no small share of the present embarrassments of America is to be charged on the blunders of our governments; and that these have proceeded from the heads rather than the hearts of most of the authors of them. What indeed are all the repealing, explaining and amending laws, which fill and disgrace our voluminous codes, but so many monuments of deficient

wisdom; so many impeachments exhibited by each succeeding against each preceding session; so many admonitions to the people of the value of those aids which may be expected from a well-constituted senate?

“A good government implies two things: first, fidelity to the object of government, which is the happiness of the people; secondly, a knowledge of the means by which that object can be best attained. Some governments are deficient in both these qualities; most governments are deficient in the first. I scruple not to assert that in American governments too little attention has been paid to the last. The federal Constitution avoids this error; and what merits particular notice, it provides for the last in a mode which increases the security for the first.

“Fourthly. The mutability in the public councils arising from a rapid succession of new members, however qualified they may be, points out, in the strongest manner, the necessity of some stable institution in the government. Every new election in the States is found to change one half of the representatives. From this change of men must proceed a change of opinions; and from a change of opinions, a change of measures. But a continual change even of good measures is inconsistent with

every rule of prudence and every prospect of success. The remark is verified in private life, and becomes more just, as well as more important, in national transactions.

“To trace the mischievous effects of a mutable government would fill a volume. I will hint a few only, each of which will be perceived to be a source of innumerable others.

“In the first place, it forfeits the respect and confidence of other nations, and all the advantages connected with national character. An individual who is observed to be inconstant to his plans, or perhaps to carry on his affairs without any plan at all, is marked at once by all prudent people, as a speedy victim to his own unsteadiness and folly. His more friendly neighbours may pity him, but all will decline to join their fortunes with his; and not a few will seize the opportunity of making their fortunes out of his. One nation is to another what one individual is to another; with this melancholy distinction perhaps, that the former, with fewer of the benevolent emotions than the latter, are under fewer restraints also from taking undue advantage from the indiscretions of each other. Every nation, consequently, whose affairs betray a want of wisdom and stability, may calculate on every loss which can be sustained from the

more systematic policy of their wiser neighbours. But the best instruction on this subject is unhappily conveyed to America by the example of her own situation. She finds that she is held in no respect by her friends; that she is the derision of her enemies; and that she is a prey to every nation which has an interest in speculating on her fluctuating councils and embarrassed affairs.

“The internal effects of a mutable policy are still more calamitous. It poisons the blessing of liberty itself. It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the Law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule which is little known and less fixed?

“Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the moneyed few over the industrious and uninformed mass of the people. Every new regulation concerning commerce or revenue, or in any manner affecting the value of the different species of property, presents a new

harvest to those who watch the change and can trace its consequences; a harvest, reared not by themselves, but by the toils and cares of the great body of their fellow-citizens. This is a state of things in which it may be said with some truth that laws are made for the few, not for the many.

“In another point of view, great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements. What prudent merchant will hazard his fortunes in any new branch of commerce when he knows not but that his plans may be rendered unlawful before they can be executed? What farmer or manufacturer will lay himself out for the encouragement given to any particular cultivation or establishment when he can have no assurance that his preparatory labours and advances will not render him a victim to an inconstant government? In a word, no great improvement or laudable enterprise can go forward which requires the auspices of a steady system of national policy.

“But the most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people towards a

political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable nor be truly respectable without possessing a certain portion of order and stability.

“A fifth desideratum, illustrating the utility of a senate, is the want of a due sense of national character. Without a select and stable member of the government, the esteem of foreign powers will not only be forfeited by an unenlightened and variable policy, but the national councils will not possess that sensibility, etc.

“Yet however requisite a sense of national character may be, it is evident that it can never be sufficiently possessed by a numerous and changeable body. It can only be found in a number so small that a sensible degree of the praise and blame of public measures may be the portion of each individual; or in an assembly so durably invested with public trust, that the pride and consequence of its members may be sensibly incorporated with the reputation and prosperity of the community.

“A ‘sixth defect.’ It is evident that an assembly elected for so short a term<sup>1</sup> as to be unable to provide more than one or two links in a chain of

<sup>1</sup> The House.

measures, on which the general welfare may essentially depend, ought not to be answerable for the final result, any more than a steward or tenant, engaged for one year, could be justly made to answer for places or improvements which could not be accomplished in less than half a dozen years.

"I shall not scruple to add that such an institution may be sometimes necessary as a defence to the people against their own temporary errors and delusions. As the cool and deliberate sense of the community ought, in all governments, and actually will, in all free governments, ultimately prevail over the will of its rulers; so there are particular moments in public affairs when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn. In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind? What bitter anguish would not the people of Athens have often escaped if their government

had contained so provident a safe-guard against the tyranny of their own passions? Popular liberty might then have escaped the indelible reproach of decreeing to the same citizens the hemlock on one day and statues on the next.

“It adds no small weight to all these considerations to recollect that history informs us of no long-lived republic which had no Senate.”

## The Fountain Head

“Talents for low intrigue and the little arts of popularity may alone suffice to elevate a man to the first honours in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States.”—*The Federalist*, No. 68.

LAST, but far from least, in the departments of American Government, is the Executive. Also, it is far from least in the vehemence and persistence with which its Constitutional credentials have been and still are, attacked. But in proportion as the Presidency of the United States is important—and it is perhaps the most honorable and the most powerful individual position in the entire world—it becomes correspondingly important to scrupulously protect its Constitutional approaches, and to deviate from established Constitutional practice only with the utmost assurance that the innovation is for better and not for worse. Destruction is easier than replacement. It is a much

simpler thing to be critical than to be correct. The Electoral College, through which Presidents are finally chosen, is as little understood as it is little appreciated. The direct election of Presidents is a reform as superficially appealing as it is inherently dangerous—dangerous, it will be shown, to the very democracy in whose name it is urged.

The Presidency is, in practice, the fountain-head of American Government. Tampering with the fountain-head is a hazardous enterprise and a heavy responsibility. However much truth may reside in the very general opinion that the people, in reality, have too little to say about who shall be President, the fact remains that America has been almost uniformly fortunate in the choice of all of her Chief Executives. Particularly in heavy crisis, the man for the occasion usually seems to occupy the White House. "The proof of the pudding is in the eating." Once more, the quality of results obtained by and for our democracy, is of greater import than the quantity of power which the democracy itself may exercise. It cannot be disputed that, in the last analysis, the Presidency is in the keeping of the people. With such a premise, and with the equally indisputable conclusion that these processes of popular control, however devious, produce an eloquently high average of satis-

factory results, the machinery for making Presidents deserves a far more favorable American opinion than it possesses; and old cogs should not be traded for new except as their superior advantage is susceptible of convincing proof.

No less than ten different plans for electing the President were submitted to the original Constitutional Convention, in 1787. When these divergent views finally were composed, the method designated met with very general approval. The Electoral College device seemed to appeal to popular reason. But the Presidency itself—the position, its attendant power, its dominant occupant—was the target for bitterly incontinent attack. An affinity was pretended between this new position and the royal prerogatives of an unlimited King. Nowhere else in *The Federalist*, which is notable for its uniformly good temper in breaking lances with the Constitution's adversaries, does Hamilton verge so close to anger and anathema as in confronting these presidential critics with their own mental dishonesty. "There is no man who would not find it an arduous effort either to behold with moderation, or to treat with seriousness, the devices, not less weak than wicked, which have been contrived to pervert the public opinion in relation to this subject. They so far exceed the usual

though unjustifiable licenses of party artifices, that even in a disposition the most candid and tolerant, they must force the sentiments which favour an indulgent construction of the conduct of political adversaries to give place to a voluntary and unreserved indignation. It is impossible not to bestow the imputation of deliberate imposture and deception upon the gross pretense."<sup>1</sup> . . . Yet, despite this malevolent hostility to the Presidency —hostility supported by what Hamilton branded as a "shameful outrage to the dictates of truth and the rules of fair dealing"—the Electoral College method of filling the position was very generally accepted. Thus accredited, even by the Constitution's enemies, in the inception, the mechanical principle involved has withstood the attacks of a century. Occasional emergency has resulted in alteration of the mode in which the Presidential Elector functions. But the Constitutional provision never has been disturbed since the ratification of the Twelfth Amendment, September 25, 1804, and that Amendment merely changed the form of the Elector's ballot, requiring him to vote separately for President and Vice President so as to avoid a repetition of the Jefferson-Burr deadlock and intrigue, without disturbing the Electors'

<sup>1</sup> *The Federalist*, No. 67.

status. Even the character of an Elector's service has been modified since he has become the mere automatic proxy for the political party he represents. Yet acknowledgment of the basic need for an intermediary device, in naming a President, has remained constant through the years. So seasoned an institution is not to be wrecked without good cause.

The mere announcement that a proposal seeks to do away with Presidential Electors and to permit a direct vote for President usually suffices to attract prompt and wide-spread approval. The American people have accustomed themselves to complain about indirection in the choice of their high National Executive. They conceive the Presidential Elector to be like unto the fifth wheel of a wagon. They refuse to understand that there is any good reason—however much the Founders may have demonstrated to the contrary—why they should not find the names of Harding and of Cox on their Presidential ballots, and why, instead, they find, in each State, the names of a group of Electors—as many Electors as the State has Representatives and Senators—representing Harding and Cox. But there is a reason, and a most excellent one; and the truth of the matter is that the substitution of a direct election system might easily make for

less actual popular power than now exists—though its gesture is otherwise. The matter is worthy of unprejudiced examination.

(1) The complete elimination of Presidential Electors or any other intermediary step in the quadrennial electoral process, and the substitution of a system of choice by total nation-wide popular vote for candidates for President, would put the choice of President largely in the hands of a few ultra-populous States. This is obvious. For example, the States of New York and Pennsylvania cast more votes in the Presidential election of 1920 than all of the following States combined: Alabama, Arizona, Connecticut, Colorado, Delaware, Florida, Georgia, Idaho, Kansas, Louisiana, Maine, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, South Carolina, Utah, Vermont, Virginia, Washington and Wyoming. If the total tally sheet for the Nation controlled the election, would not the dominant influence always reside in a comparatively few populous States? So long as there is an intermediate step, so long as each State's vote is counted by itself, an overwhelming majority in Michigan, for Michigan's choice, for example, cannot be used to entirely submerge and practically wipe out the smaller

majorities in half a dozen other and smaller States against the candidate who is Michigan's choice. In other words, Michigan's total vote is a unit unto itself. By sheer bulk of population it cannot, to all intents and purposes, disfranchise a group of smaller States whose contrary majorities might be wholly swallowed up in Michigan's figures if a straight balance sheet for the whole Nation were struck. The Fathers of the Republic refused to consent to the proposition that "population" is the only thing entitled to representation in a representative democracy. They recognized the important contribution made to the national life by great agricultural areas, for example, where the density of population would be comparatively low. They insisted that big States, speaking in terms of mere population, should not wholly dominate little States with big and important resources in other directions. For this reason, primarily, they gave every State, regardless of size, two votes in the United States Senate. For the same reason, they insisted upon segregating unto itself the vote for President in each State. They were wise in their generation; and their wisdom, in this respect, is even more pertinent to-day. It would indeed be pathetically poor public policy to deliver sled-length dominion over the whole country into the hands of the thickly

populated, closely congested, industrial centers of the land, because these centers, more than any other areas, are constantly exposed to the dangers that accompany the restlessness and the radicalism inherent in bulked and floating masses of people. *The Federalist*<sup>1</sup> recognized the fact that the populous States would "always contend for a participation in the Government, fully proportioned to their superior wealth and importance"; also that the smaller States "would not be less tenacious of the quality enjoyed by them" in the old Confederation; therefore, that, since "neither side would entirely yield to the other, the struggle could be terminated only by compromise." The "compromise" was a happy one; and the subsequent popular evolution of the country has multiplied its justification. For example, in the Presidential election of 1860, Douglas, the champion of "squatter sovereignty," carried only two States, yet his popular vote reached the threatening total of 1,376,000—only 500,000 popular votes behind Lincoln. Suppose he had similarly carried just one State more; and suppose we had been electing Presidents by merely totaling all the popular votes! Suppose that, and you can then figure out what might have happened to America without a Lin-

<sup>1</sup> No. 37.

coln in a Civil War! It requires no stretch of the imagination to picture a situation in which those same two States, joined by but two or three more, could, by virtue of mere bulk population, out-vote the balance of the Nation and elect a President acceptable to but one little corner of the Country. Would that be more "representative," in net effect? On the contrary, would it not be vastly less "representative" in the true, American sense of that word? For some pseudo-reformers, the Constitution is little more than an inherited and irksome hobble; but the more carefully its blessings are analyzed, the more respectful thoughtful men must become in the presence of its advice.

(2) There are other less destructive gentlemen who would eliminate the Presidential Elector, put the name of Presidential candidates directly on the voters' ballots, but still assemble the votes by States, instead of in the Nation at large, and then, finally, let each State count, as now, in the final reckoning at Washington. In other words, they would avoid the menace described in the preceding paragraph. To all intents and purposes, they would leave the counting system as it is. Their essential change would provide that the individual would vote directly for Harding instead of for the State's slate of Harding Presidential Elec-

tors.<sup>1</sup> The casual observer may find much ado about nothing in an argument against a proposal which thus may seem, on the surface, like a distinction without a difference. But the "difference," upon examination, proves to be decidedly profound, and to involve correlative considerations of very definite importance.

The best approach to these latter contemplations is through the explanation of an earnest statesman who believes in this proposed reform.<sup>2</sup> "In order to be elected President," he declares, "it is necessary to be nominated by some political party. There is no other practical way so long as our antiquated Electoral College remains a part of the Constitution. . . . If the Electoral College were abolished, then independent candidates for President could have their names placed upon the official ballots of the various States by complying with the methods provided by State statutes. . . . Abolition of the Electoral College would make it not only possible but practical for the people to disregard party and to elect independent candidates. It would place the office of President of the United States within the hands of the people themselves."

<sup>1</sup> Senate Joint Resolution 151, introduced January 4, 1922, by Senator George W. Norris of Nebraska.

<sup>2</sup> Interview with Senator Norris, *Chicago Tribune*, January 14, 1922.

Let us see whether, in ordinary practice, the net result would not be actually to take the office of President farther away from the hands of the people themselves.

It is urged, it will be noted, that the elimination of the Electoral College—which, of course, requires a nation-wide, organized sentiment behind a Presidential candidate ere his proxies, his Presidential Electors, can be nominated in all the States—would make it easier for independent candidates for President to qualify.<sup>1</sup> If they could not qualify in all the States, they could qualify in a few. Sporadic and immature political rebellion could more easily capitalize itself. In a word, it would be easier for ambitious gentlemen to run for President. By the same token, there would be more of them running. Here, an “agricultural bloc” would have a nominee for President. There, a “labor bloc” would enter its favorite upon the lists. There would be a “wet bloc,” a “dry bloc” and a “moist bloc.” With major political parties disintegrated and all emphasis put upon “independent” candi-

<sup>1</sup> As a matter of fact, of course, the existing system does not prevent independent candidatures when there is nation-wide justification. When there is a real and a formidable excuse for political insurgency, the Electoral College is no inconvenience whatsoever. Witness the Roosevelt campaign of 1912.

dates—all easily qualifying for place on the ballot—there would be a vast decentralization of political affiliations. Without the traditional rallying points, and with political centrifugalization suspended, the natural tendency would be toward re-organization into these groups. All such things as Nationally crystallized popular opinion easily could disappear. We should have many candidates for President instead of a well emphasised few. It would be a rare crisis which would give any one "independent" candidate for President such sudden command of the far flung, and equally fickle, electoral affections of the American people, as to win an electoral majority. Do we not come to the inevitable conclusion that few Presidential elections would show a majority? What, then, is the net result? The election of Presidents, not by the people at all, but by the House of Representatives—the forum into which the election has to be thrown in the event of failure of a majority of State votes for any one candidate.<sup>1</sup> The election of Vice-Presidents, not by the people at all, but by the Senate—the forum provided for similar emergency.

<sup>1</sup> The Norris proposal comprehends this same disposition, with only slight alterations in House procedure, as now exists under the Constitution. It is inconceivable that any system should ever be seriously suggested, under which a President could be the choice of a minority of the States.

Not a step forward: a step backward. Not more democracy, but less—distinctly counter to the proletarian purposes in which such enterprise is always clothed.

In all the long Congressional debates in Congress during the past one hundred years in relation to this moot question, if there has been one point more than another where opposing factions have found invariable concert, it has been on the proposition that it is a bad thing for America to have Presidents chosen by Congress. Under the existing Electoral College system, with its discouragements to independent candidatures, a majority of States, in a Presidential election, rarely fails to materialize. We have not experienced such a case since 1825—and at that time, parties were not really existent. But under any of these proposed substitutes for the Electoral College, a majority would become the exception rather than the rule. The choice of a President by the people, by the same token, would become the exception rather than the rule. When President Garfield was in Congress,<sup>1</sup> he urged that "liberty is impossible without a clear and distinct separation of the three powers of

<sup>1</sup> These quotations are all from an illuminating book entitled *The Electoral System in United States History*, by J. Hampden Dougherty.

Government." Senator Sherman, in the debates of 1886, referring to another phase of the same problem, condemned any Legislative invasion of the Presidential field, declaring it to be "a thing not only never dreamed of by the Fathers, but the possibility of which they believed they had effectually averted." "One central truth illuminates the wearisome discussions before the Electoral Commission of 1887," says Dougherty in his admirable book upon the Electoral System, "that the great effort of the framers of the Constitution was to make the Executive independent of the legislative, and to place the election of the President beyond the reach or control of Congress." What, then, would Hamilton say if he were here to-day? It is a favorite canard to charge him with lacking trust in the people. At least, let it be admitted that he put his whole, great heart and soul into a Constitutional defense against the invasion of the rights of the people by the Legislature. Even when President Martin Van Buren was trying to do away with Presidential Electors, he had to admit that upon no point were the people more thoroughly united than upon the "propriety, not to say indispensable necessity, of taking the election of President from the House of Representatives." Shall we readily yield to new proposals, constantly re-

newed, which might easily throw every election of every President into the House of Representatives? Are there not some debits that might be even worse than this Electoral College system under which we have lived successfully for more than a century and a quarter? After all, are things so bad that they might not become worse? When once amended, the Federal Constitution stays amended for many a long day. Is it entirely obvious that the abolition of the Electoral College is a reform deserving such permanence?

(3) A parenthetical consideration enters here. Is the discouragement of major political parties, and the substitution of "independent" candidates for high public responsibility, a useful service to the people? One can defend the necessity for political parties as an indispensable means to a responsive end in a representative democracy, without turning apologist for all the back-stage manipulation in the average National political convention where Presidents are nominated. The method of nomination is not germane to the Constitutional question we are considering. Methods of nomination might well be purged and improved and popularized—perhaps by the uniform, direct election of party delegates therefor. If *The Federalist* said anything at all pertinent to this phase of

the case, a condemnatory warning might well be taken from these words<sup>1</sup>: "Nothing is more to be desired than that every practical obstacle shall be opposed to cabal, intrigue and corruption, these most deadly adversaries of republican Government." Political conventions that smack of cabal and intrigue and corruption, are deadly. There are conventions that go wrong just as there are primaries that are debauched. No mechanical device, incidental to Government by parties, will ever be infallible. But this collateral fact does not, in the slightest degree, disparage the fundamental axiom that public opinion cannot find organized expression except as major political parties provide organized opportunity to this essential end. Non-partisanship is a practical ideal in limited units. But in the nation-at-large, when 25,000,000 voters are groping for means to ordain responsible and consecutive and co-ordinated management in the business of National Government, the end of parties will be the beginning of chaos. Parties are an imperfect creation at best. But they are infinitely superior to lack of all liaison whatsoever. You may as well talk of "independent Captains" for each Company in a Regiment of Infantry—and then expect such an Army to function resultfully—

<sup>1</sup> No. 68.

as to talk of National Government without some semblance of a central thread of organized policy. Political parties are an extra-judicial National necessity in the American Republic. Anything that tears them down, in National affairs, is of far less practical utility to the popular welfare than are those efforts and undertakings that seek to make them definitely stronger and, therefore, definitely more responsible. They need cleansing from time to time—and the people have a habit, despite fancied barriers, of achieving this result. But their total elimination would be a tragedy.<sup>1</sup> Daniel Webster once said: "There has been, and always will be, two dominant parties in politics, and this is indirectly an advantage to the general interests of

<sup>1</sup> When the alignment of existing dominant parties ceases to permit effectual division upon major issues, it is time for the alignment to change; but it is never time for some sort of a party alignment to disappear. Many thinkers believe the time is now here for just such a realignment. Mr. Frank Munsey told the American Bankers Association Convention, New York City, October, 1922, that the new alignment should be Liberal-Conservatives *v.* Radicals. Dr. Butler, President of Columbia University, declared in an address the same month, that the new alignment should put "constructive liberals" in one party and "destructive radicals" in the other. Whatever the alignment, one party should represent uncompromising loyalty to the Spirit of the Constitution—the party to which Hamilton would lend his talents, if he were here to-day.

the country." Parties may change. One may absorb and succeed another. But in the long run, it is best, as Henry Clay once observed, if there are but two dominant parties—"one to watch the other." It is all very well for voters, as individuals, to be "independent" in their electoral judgments. An intelligent ballot must, of necessity, be a scrutinizing ballot: in other words, it must always be "independent" to the extent of sustaining a party only so long as a party deserves to be sustained. But it is one thing for the voter to be "independent" of irrefragable party ties: and quite another thing for "independent" groups to supersede all parties and thus factionalize American elections to an extent which will defy all possibility of dominant electoral trends and concentrated responsibility in Government. Even Washington and Hamilton, who originally cautioned the swaddling Republic against political parties, ultimately found it necessary to utilize parties in order to crystallize public opinion on the outside of Government, and to get co-ordinated results on the inside of the Government. Indeed, Hamilton was the founder, the inspiration and the guiding genius of the first political party ever cohesively launched under the Constitution. Any basic change in political machinery would fly in the face of time

and experience and make dubious contribution to an era which is at best, turbulent, uncertain and in a state of flux. The chief and unanswerable indictment against the direct primary is its negation of party responsibility and its failure to make legitimate party organization articulate—weaknesses which must be cured if the primary itself, on the one hand, or the Government, on the other, is to be saved from disintegration. If the Electoral College, in any remote degree, helps postpone the hour when this country shall try to function through diversified and unrelated groups, instead of through one, strong, majority party, and one scarcely less strong, minority party, it justifies its existence tremendously.

(4) The mere fact that the individual citizen votes for Mr. Harding's "Presidential Elector," instead of for Mr. Harding direct, does not mean that the citizen is shorn of authority or that his suffrage is hampered. The net result, so far as his ballot is concerned is identical in both cases. Therefore the pretended gain from a change in the system is wholly theoretical. Of course, it was originally intended to repose absolute control over the choice of President and Vice-President in a small body of citizens carefully selected for that purpose and free to exercise its own best judg-

ment.<sup>1</sup> But the character of this body of citizens, this Electoral College, has since changed. The Elector has become the mere registering agent for the mandate of his constituents, and the unbroken constancy with which he keeps the trust, is proof conclusively that the mass electorate controls as effectually through him as it would if he were not its faithful oracle. As long ago as 1825, Senator Benton, pioneer opponent of the Electoral College, had to admit that "in every case the Elector is an instrument bound to obey a particular impulsion; and disobedience to which would be attended with infamy, and with every penalty which public indignation could inflict." Benton correctly de-

<sup>1</sup> "The tendency in this democratic age is to overlook the fact that the Fathers of the Constitution were not believers in the rule of the people, and it was not until after 1800 that manhood suffrage was adopted in any of the States."—*The Electoral System in the U. S.*, by J. Hampden Dougherty, I. The Fathers most certainly did not believe in the pure democracy of the commune. But they did believe in the final responsibility of a representative Government to the people governed, and they proved it in a multitude of ways. Let it not be forgotten that, at the time of the adoption of the Constitution, it was the most startlingly "progressive" piece of public work in the history of the world. That the machinery provided, through the Constitution, has permitted the broad evolution of Government in subsequent "progressive" generations, is the best proof of their motives. They believed that a new citizenship must creep before it walks—and they provided the forms suited to both conditions.

scribed the Elector as "an agent tied down to the execution of a precise trust." Suffice it, to prove the point, that no Elector has ever been guilty of violated trust since the advent of political divisions. The only scandals, involving Presidential counts, have arisen when Presidential elections have passed out of the Electoral College and into the Congress—as when Hamilton rallied the Federalists in 1800 to defeat Aaron Burr's intriguing conspiracy to count Jefferson out of The White House—and when unproven stigma accused Henry Clay of trading votes to John Quincy Adams in 1825 in return for a Cabinet portfolio—and when the Hays-Tilden contest of 1876 all but threatened the possibility of renewed civil war. It is not the Presidential Elector who has featured historical charges of broken faith. It is in Congress itself—when a majority of the States' votes fail any one candidate for President—that this menace lies, if it lies at all; and the elimination of the Electoral College, as we have seen, would tend to throw more, rather than less, of these contests into the House of Representatives. Presidential Electors in no degree interfere with clear and undiluted registration for the will of the people. There is no true question of popular power over The White House involved in their continued existence—except as

their disappearance would hazard this popular power. It is one of the strange paradoxes of time that, back in the days when Electors as originally conceived really did hamper mass articulation, Hamilton has testified that this part of the Constitution "is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents,"<sup>1</sup> and now, when Electors merely serve as recording agents for their sovereign constituents, we hear that the system must be changed for the sake of a more articulate democracy.

(5) Still another advantage claimed for the abolition of the Electoral College is the curious notion that there would be some sort of utility in permitting the choice of Presidents and Vice-Presidents of opposing parties. "Under present conditions," says one advocate, "it is an impossibility for any voter to vote for a candidate for President on one ticket and a candidate for Vice-President on another ticket. . . . The voter should be allowed to vote for any person for either one of the offices. . . . Such right is, in fact, fundamental in a free country."<sup>2</sup> Nothing is

<sup>1</sup> *The Federalist*, No. 68.

<sup>2</sup> Norris interview, *Chicago Tribune*, January 14, 1922.

fundamental in a free country, which is inimical to the best advantage of useful Government. The best welfare of the country can never be served by putting men of opposite beliefs at the head of the Government. Such a condition would seriously intensify the jolting uncertainty and restlessness when a mid-administration death requires the Vice-President to succeed to first Executive authority. We tasted that medicine when Andrew Johnson succeeded Abraham Lincoln. If the Captain and First Mate of any ship are not in harmony, results are likely to be rough on the passengers. As for the suggestion that our present inability to put hostile officers atop the bridge of the Ship of State, violates some "fundamental right" in this "free country," this is fallacy unless one is willing to admit that "fundamental rights" have been violated for a century. Until 1804, it was possible for Presidents and Vice-Presidents to be of opposite faiths. But the Twelfth Amendment substantially put an end to that anomaly. Have we forgotten all our lessons? Must fingers be burned all over again?

(6) Finally, there is admonition in the history of attempts to break down the Electoral College. They would not uniformly have failed but for excellent reasons which we may well respect. "Direct election of Presidents" is no new fetish, born of

modern radicalism. Senator Thomas H. Benton of Missouri initiated twenty years of labor in this cause as long ago as 1823. A Select Committee of the Senate recommended such a change in 1826, but failed to win a two-thirds Senate approval. The New York State Senate, dissatisfied with the election of President John Quincy Adams in 1825, when lack of an electoral majority threw the verdict into the House of Representatives, demanded a Constitutional Amendment "giving the choice of President and Vice-President to the people." President Jackson, one of the ill-favored candidates in the 1825 disturbance, repeatedly recommended the change in his executive messages. Futile amendments were offered in the House by George R. Gilmer of Georgia in 1836, and in the Senate by William O. Allen of Ohio, in 1837. During debates in Congress on the Civil War Amendments, Senator Charles Sumner renewed the fight Benton had begun four decades before. Senator Oliver P. Morton of Indiana made particularly valiant efforts in this direction in 1874 and again in 1876. He declared that "experience, as well as reason, now suggests that the rubbish of the Electoral College be brushed away entirely." Senator Buckalew and Representative Maish, both of Pennsylvania, took up the fight where Morton laid it down, but to

no avail. The disputed Hays-Tilden count of 1877 was followed by a considerable number of proposed Constitutional Amendments. Representative Southard of Ohio formally reported an Amendment from Committee in 1878. John G. Carlisle later championed the substantive features of the Maish and Southard plans.

Thus it is seen that great men and great minds have attacked the Electoral College since the hour of its creation. Yet the College still stands. Modern generations have had none of the intimate aggravations which attended presidential elections in 1800, 1824 and 1876. Hence the need today for change lacks much imminent plausibility which has been apparent upon previous futile occasions. If the change could not justify itself before, it cannot justify itself now. Though James Madison, in his old age, agreed that Presidential Electors should be abjured, the vitality of an institution which has survived 130 years of relentless attacks confirms the verdict of Hamilton who contemporaneously said: "I venture somewhat further, and do not hesitate to affirm, that if the manner of it be not perfect, it is at least excellent."<sup>1</sup>

Down through the years many disputed questions of law have required and received clarification

<sup>1</sup> *The Federalist*, No. 68.

in relation to the electoral count, but the Electoral College itself has survived all these processes. Literally years of congressional debate have centered round the allocation of power and authority to pass upon disputed electoral votes. The argument started in 1800 with disagreement between House and Senate in regard to their relative prerogatives; it reached one mile-stone in Rebellion Days when the famous "Twenty-second Joint Rule" gave either Legislative branch the right of rejecting electoral votes; it reached another milestone in 1877 when Congress reversed itself and required that electoral votes should be counted unless both branches rejected them; and it came down to what is probably definite and final conclusion in the Act of February 3, 1887 which favors the latter rule. Through crisis after crisis—as spectacularly typified by the Electoral Commission Bill of 1877 which drew upon the Supreme Court for five umpires in the Hays-Tilden controversy—collateral means to every desired end have been found without disturbing the existence of the Presidential Elector himself or the bona fides of the Electoral College system. However much we epochal egotists of today may scorn the moss of historical experience, surely there is something to give us pause in this realization that thirteen

decades of our forebears, though pressed by electoral irritations from which we are now comparatively free, have refused to substitute new stone in this particular corner of our Constitutional foundations. There have been severe differences of opinion whether Electors in the various States should be chosen at large<sup>1</sup> or instructed by Congressional Districts—the latter system, finally attacked by President Benjamin Harrison in a presidential message, now being generally discarded. There have been long and earnest debates over many other phases of this machine for naming National Executives. As a result a century of precedent and admonition now serves to guide us in any repetition of previous presidential election crises. There must be profoundly good reason before the Nation may justify itself in throwing this accumulated enlightenment to the winds and embarking upon a totally new adventure.

Undoubtedly there are things incidental to the presidential tenure that could be served by corrections which would not invade Constitutional fundamentals. For instance, the "disability" of the President—such as to require Vice-Presidential succession—needs specific definition. Again, the interlude between quadrennial November elections

<sup>1</sup> By the so-called "general ticket" system.

and March inaugurations might easily number dangerous days for the Republic.<sup>1</sup> Neither of these twilight zones of uncertain power, should be permitted to exist. They make for nerveless authority at the National helm. There can be no question about *The Federalist's* advice upon this score, for it very definitely said: "A feeble Executive implies a feeble execution of the Government; and a Government ill executed, whatever it may be in theory, must be, in practice, a bad Government."<sup>2</sup> But such corrections as these do not involve a basic Constitutional principle; they involve merely the mechanics in the development of the principle. The principle itself—the tenure and the basic method of filling the Presidency—deserve to remain constant, unless and until definite and practical advantage can be unanswerably demonstrated to recommend an alteration.

In the matter of tenure, it should be noted that proposals intermittently suggest the substitution

<sup>1</sup> During just such an interlude in 1913 retiring President Taft had to mark time in a grave Mexican crisis, in order to leave his successor with a free hand. And what a terrifically and menacingly delicate situation would have existed in the winter and early spring of 1917, on the threshold of American entry into World War, if President Wilson had not been his own successor!

<sup>2</sup> No. 70

of a six for a four year Presidential term, with a restriction to one term of service.<sup>1</sup> Here, again, there can be no doubt of what Hamilton would say and do if he were counseled today. The doctrine of "re-eligibility" is strongly defended in *The Federalist* and the counter-doctrine of closely limited tenure is as vigorously denied. "This exclusion," it declared, "would have effects which would be for the most part rather pernicious than salutary. One ill effect of this exclusion would be a diminution of the inducements to good behaviour. . . . Another ill effect would be the temptation to sordid views, to peculation, and, in some instances, to usurpation. . . . That experience is the parent of wisdom is an adage the truth of which is recognized by the wisest as well as the simplest of mankind. What more desirable or more essential than this quality in the Government of Nations? Can it be wise to put this quality under the ban of the Constitution, and to declare that the moment it is acquired, its possessor shall be compelled to abandon the station in which it was acquired, and to which it is adapted? . . .

<sup>1</sup> The Democratic National Platform, adopted at Baltimore, July 2, 1912, said: "We favor a single Presidential term, and to that end urge the adoption of an Amendment to the Constitution making the President of the United States ineligible for re-election."

A fourth ill effect of the exclusion would be the banishing of men from stations in which, in certain emergencies of the State, their presence might be of the greatest moment to the public interest or safety. . . . A fifth ill effect would be that it would operate as a Constitutional interdiction of stability in the administration." Hamilton argued against "necessitating a change of men"—against "disabling the people to continue in office men who had entitled themselves to approbation and confidence." Who shall say, today, that he was not wise in his generation? Who shall say that a tradition and a habit against a prolonged Presidency is not better and safer than a Constitutional stricture which could not be changed in an emergency? The one is elastic under pressure of necessity; the other is a self-made barrier which is as insurmountable as, in some crises, it might be fatal.<sup>1</sup>

Perhaps this general discussion of "the fountain head" can be no better ended than with an observation relative to the character which an incumbent himself should give to the Presidency. What *The Federalist*<sup>2</sup> had to say of the authority intended to inure to the station, modern necessities recommend to both the station and the man who fills it:

<sup>1</sup> *The Greatest American*, by Vandenberg, 169-170.

<sup>2</sup> No. 70.

"There is an idea, which is not without its advocates, that a vigorous Executive is inconsistent with the genius of republican Government. The enlightened well-wishers to this species of Government must at least hope that the supposition is destitute of foundation, since they can never admit its truth without at the same time admitting the condemnation of their own principles. Energy in the Executive is a leading character in the definition of good Government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the Laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary courses of justice; to the security of liberty against the enterprise and assaults of ambition, of faction, and of anarchy."

## Land-Marks

"I have had an eye, my fellow citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision, in a matter of the utmost moment to your welfare, by any impressions other than those which may result from the evidence of truth."—*The Federalist*, No. 1.

HAVING completed a survey of structural fundamentals, in relation to the letter and the spirit of the Constitution, perhaps the function of this inquiry should be considered wholly served. But there remain a few general themes so characteristically Hamiltonian, so definitely comprehended by *The Federalist's* purview, and so intimately related to the jeopardy of American institutions, that it would be an act of negligence to omit a final, generic interview with these oracles of yesterday while their recalled spirit lingers to instruct, to guide and to inspire. If Hamilton were here today, in something more tangible than the licensed imagination, his encyclopedic wisdom would be

eagerly drafted in a multitude of consultations, just as it was when the first Congress called upon him to blaze the trails out of Constitutional perplexities. The last Congress needs him no less than did the first. The country needs him now, as much as ever. Problems wear different guise. But in principle, they are akin. Modern times, of course, face situations that were remote even to the fertile imaginations of the Founders; and these situations, by the same token, frequently require the development of new machinery. Hamilton, if here, would be the last man to hesitate in these developments. But we are entirely sure that in all of these developments he would insist that the new machinery should not desert the elemental truths of proven mechanics. No matter what the developments and evolutions, behind everything, underlying everything, permeating everything, must be the unshaken truths of proven Republican elementals. The spirit and the purpose of the Constitution must be the dominating formula.

All honorable men did not agree with Hamilton one hundred and forty years ago. All of them will not agree with him to-day. There can be honest differences of opinion. We make no pretense that Hamilton monopolizes verity. But it is dishonest and dishonorable—now, as then—either to deny

him hearing, or to resort to unbridled and scurrilous rejoinders when legitimate logic fails of breath. Hamilton was the soul of courageous fair-play. The same day that he sounded his clarion apostrophe to liberty at New York's "Meeting In The Fields"—when the spell of his eloquence was driving his fellow-patriots to the extremes of action—he dared to stand upon the steps of old Dr. Cooper's house and argue back an angry mob of maddened citizens intent upon wreaking vengeance on a suspected Tory scholar. His memory, and its admonitions, deserve fair-play in return; and the fairer and the more honest the country's consideration of him may be, the fairer and the more honest it will be to its own destiny.

If Hamilton were here again in flesh and blood, he would, nevertheless, face defamation and contumely and misunderstanding—largely from quarters required to resort to anathema for want of an honest answer to his creeds and deeds. But he would be no stranger to such familiar, unclean strategy; nor would it change his course. Nothing that modern iconoclasts might say—probably are saying, even of this book—could probe greater depths of malignity than the attacks of Jefferson's subsidized editor in the old *National Gazette*—attacks utterly crushed by Hamilton's famous

letter to Washington—or the Congressional resolutions impugning his integrity—resolutions which he forced his discomfited enemies to bring to a vote of gloomy defeat. J. T. Callender, scandal-monger of the Revolutionary era, even likened him to Caligula and Alva. If Washington's exalted service to the Republic could all be forgotten, in a momentary burst of passion demanding his impeachment, incidental to the Jay Treaty with England, it is not surprising that the motives of Hamilton who, like Robert Morris repeatedly pledged his private resources to support the shattered public credit, should be condemned by incontinent and ungrateful critics who would themselves assay as nothing but alloy under similar acid test. But villification never altered the fixity of his program by the breadth of a hair; nor can it debauch the wisdom with which he would sustain America if he were here to-day.

It has long been vogue among impatient "reformers"—who know nothing, and care less, about the difference between a Representative Republic and graduations toward a pure democracy—to dismiss Hamilton as a reactionary, dismissal being safer than debate. But nothing that this spurious brand of "progressivism" might say—probably is saying, even of this book—could blur the historic

fact that Hamilton was, in the true sense of the word, the greatest Progressive of his time.

Was it not "progressive" to fight down the Tories and the Bourbons who hated him and feared him more than any other single figure in the Revolution? Was it not gloriously "progressive" to spurn the gold with which they tried to buy his deadly pen? Was it not "progressive" to achieve the Constitution, the most forward-looking event in history since the birth of Jesus Christ? Was it "progressive" to pioneer in pitiless publicity that the people might know the official intimacies of their public business?<sup>1</sup> Was it not "progressive" to chart universal education with the avowed desire "to place a book in the hands of every American child?"<sup>2</sup> Was it not "progressive" to demand the impartial administration of the Law, for rich and poor alike? Was it not "progressive"—the

<sup>1</sup> Defeated in all his efforts to move the old Continental Congress into resultful action, Hamilton sought to have its debates published and its sessions opened to the public. He was told to go outside "to the balcony" and make his speeches if he sought a wider audience. The time was rapidly approaching when the whole Government would be his "balcony," and the whole world his pit.

<sup>2</sup> This was his greatest interest in the New York Legislature. He also initiated the movement which produced the University of the State of New York, and he was one of the founders and incorporators of Hamilton College.

most progressive single act in American history—to evolve the Constitutional doctrine of liberal construction and implied powers, so that the Great Charter, though holding fast to fundamentals, did not become a strait-jacket and a garrote?<sup>1</sup> Was it not "progressive" to write down the first, complete exposition of Tariff Protection<sup>2</sup>—and yet to warn against the danger of permitting Protective Tariff duties to go too high?<sup>3</sup> Was it not "progressive" to oppose undue severities in the Alien and Sedition Act, in the Adams Administration, saying—"Let us not establish a tyranny; energy is a very different thing from violence"? Was it not "progressive" to defend the unliquidated claims of Revolutionary heroes whom public selfishness and forgetfulness neglected? Was it not "progressive" to defend the freedom of the press in the greatest philippic of the age?<sup>4</sup> Was it not "progressive" to

<sup>1</sup> The result was a system which "guards equally against that extreme facility which would render the Constitution too mutable, and that extreme difficulty, which might perpetuate its discovered faults."—*The Federalist*, No. 43.

<sup>2</sup> Hamilton's "Report on Manufactures."

<sup>3</sup> *The Federalist*, No. 35.

<sup>4</sup> In the defense of Croswell, Hamilton spoke six hours—"his greatest forensic effort," says Kent—laying down the principle that "the liberty of the press consists in the right to publish with impunity truth with good motives and for justifiable ends, whether it respects Government, magis-

wage relentless war upon the sordid political cupidity of Aaron Burr, one of the first gangsters to organize money for the electoral control? Was it not "progressive" to serve mirific responsibilities so unselfishly—despite unlimited money-gaining opportunities—that when he died, his Estate consisted mainly of nothing but unsullied fame? Was it not "progressive"—in a sublimated sense—to die for Constitution and for Union?

These are Hamiltonian ideals and mandates—yesterday, to-day, to-morrow. If they be not "progressive," God save America from all the fakes and shams and hypocrices that assume this name and then rape its virtues. In a final consultation, therefore, of the land-marks of the Republic—erected on the highways of National history by Hamilton and *The Federalist*—let it be sensed that

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tracy, or individuals." Hamilton always believed in free expression of legitimate public opinion. His philosophy in relation to the press was liberty to print, then responsibility for the published product; liberty "before the fact," responsibility "after the fact." He would be a modern foe to all censorship—including, undoubtedly, censorship of the modern motion picture which is kindred to the press as a mode of expression. It would not be the length but the direction of the step which he would fear. It is significant to note, in this connection, that in the first formidable test of mass opinion on this moot subject, a Massachusetts referendum rejected a motion picture censorship law, November, 1922, by an adverse vote of 545,919 to 207,476.

the most progressive authorities, as well as the most faithful, are directing our considerations.

It would be natural that Hamilton, if he were here to-day, should be particularly solicitous about the preservation of the public credit. This would be emphatically true if he could hear some of the wild-eyed economic theories constantly soliciting modern America to desert sound and proven fiscal bases, and experiment with "printing press money" which would invite the American dollar to company with the Russian ruble and the German mark. When Hamilton was only twenty-three—contemplating \$160,000,000 of depreciated colonial bills in circulation, \$40,000,000 of unliquidated public debt, and an unpaid Army with fast multiplying arrears—he wrote to Robert Morris and demonstrated that real money, money backed by intrinsic value, was the only salvation for the situation. Never did he retreat from these faiths in honest money. A few years later, *The Federalist*<sup>1</sup> declared: "The loss which America has sustained since the peace from the pestilent effects of paper money on the necessary confidence between man and man, on the necessary confidence in the public confidence, on the industry and morals of the people and on the character of republican Government, con-

<sup>1</sup> No. 44.

stitutes an enormous debt against the States chargeable with this unadvised measure, "which must long remain unsatisfied; or rather an accumulation of guilt, which can be expiated no otherwise than by a voluntary sacrifice on the altar of justice of the power which has been the instrument of it."<sup>1</sup> "Paper money," in the sense here intended, is money lacking an intrinsic equivalent of immutable value. It is the "paper money" which floods Europe beneath an engulfing deluge scarcely less fatal than vast inundation by the seas. It is the "paper money" which would ruin America, if Russian-esque colonizers could invade our sanity, or if socialistic theorists could involve us in exploded experiments, or if uninstructed economic adventurers could lure us into the mad notion of issuing "money" against "public improvements" which may or may not liquidate themselves.

It was a religion with Hamilton that unimpeachable public credit was pre-requisite to any semblance of National honor. A people who repudiated their debts, or sought escape from them through the use of depreciated money, were no better, in his

<sup>1</sup> The "sacrifice of power" here referred to, was the Constitutional prohibition extended to bills of credit—"a prohibition which must give pleasure to every citizen, in proportion to his love of justice and his knowledge of the true springs of public prosperity."—*The Federalist*, No. 44.

rigid estimates, than an individual who cheats his creditors. Consequently, his was frequently a lonesome voice in that expedient day when it was quite the habit to repudiate whatever it was inconvenient to redeem.<sup>1</sup> But at one time or another fighting the leadership of both Madison and Jefferson, he forced the par redemption of every penny of the Revolutionary debt, insisting that a promise to pay was sacred and that its repudiation could be excused by no exigent reasoning if the pledged word of the debtor-Nation was to stand clean before the world. It was his everlasting contention that no Nation could afford to compromise its debts, no matter what immediate relief might seem to

<sup>1</sup> The London *Spectator*, September 30, 1922, referring to the cancellation of Europe's World War debts to America, says: "In matters of debt, these people—the American anti-cancellationists—are sincere disciples of Alexander Hamilton, the foremost exponent of sound public finance in the history of the United States. Hamilton believed uncompromisingly in the payment, to the last dollar and cent, of obligations incurred in the public name. Anything savouring of repudiation, or of even unnecessary delay in payment, struck this eminent lawyer, Constitutional, and financier as full of public and private menace to the development of economic interests and of civilization. 'Be stringent in public expenditure, borrow only when you must, pay as quickly as you can—so you will be able to borrow again if in actual need'—such was the fiscal philosophy of Hamilton. And the American anti-cancellationists, whatever their shortcomings, are devoted Hamiltonians."

recommend an easier way. "Who would lend to a Government that prefaced its overtures for borrowing by an act which demonstrated that no reliance could be placed on the steadiness of its measures for paying," *The Federalist*<sup>1</sup> inquired.<sup>2</sup> The integrity of public credit, for Hamilton, was the practical measure of a Nation's honor, and its chance for a respected place in the evolution of prosperity. Does it require any stretch of the imagination to sense what his attitude would be toward World War debts, if he were here to-day?<sup>3</sup>

In the entire realm of Federal finance, Hamilton

<sup>1</sup> No. 30.

<sup>2</sup> Again suggestive of the constancy of economic truth, the reader is invited to compare this sentence with the almost identical message of Lloyd George to Russia at the Genoa Conference of 1922.

<sup>3</sup> Interesting evidence of a renaissance in Hamiltonism appeared in Mr. Herbert Houston's new magazine, *Our World*, in a series of 1922 articles by Arthur Bullard on "The Credit of the Nations." We quote the author's own synopsis, September issue: "In the first article of this series, Mr. Bullard argued that Credit is the foundation of our modern economic life and that to lose faith in the solvency of the Great States would be a disaster worse than war. In the second article he discussed how America has in the past met her war debts and how the financial genius of Alexander Hamilton saved this country, after the Revolution, from bankruptcy. In the concluding article, he argues that Hamilton's fundamental idea—that wealth is most rapidly created by the development of frontier lands

would continue to plead for sheer honesty. In all relations involving material rights and obligations, he would continue to stand unflinchingly on the side of honor and probity. He would reject the cunning expedients of fraudulent statesmanship no quicker than the vaulting nonsense of socialistic and communistic deceits. "Reflections of this kind may have trifling weight with men who hope to see realized in America the halcyon scenes of the poetic or fabulous age; but to those who believe we are likely to experience a common portion of the vicissitudes and calamities which have fallen to the lot of other Nations, they must appear entitled to serious consideration."<sup>1</sup> He never exalted property rights above human rights; but he never permitted himself to be blinded by the absurd philosophy that the latter can be effectually served to the exclusion of the former. It was his hope that the Federalization of the American people would shield them from major dangers in all of these directions. "A rage for paper money, for an abolition of debts, for an equal division of property, or for any other wicked or improper project, will be less apt to pervade the whole body

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—contains a constructive suggestion to help us to-day in the handling of the Inter-Allied Debt."

<sup>1</sup> *The Federalist*, No. 30.

of the Nation than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State."<sup>1</sup> His recommendations, in kind, if he were here to-day would challenge all experiments upon public credulity, all tunnellings beneath the public credit, all deflections from sound political economy, and all expedients seeking compromise with honor and integrity. Men listened to him in the days of the foundation, with the result that the foundations were plumb and true. Men can ill-afford not to listen to him now. America set a precedent for herself and an example for the world when, in the midst of terrific economic pressure, she practised what Hamilton preached, shouldered all of her fiscal burdens without a murmur or compromise, clung to honest money and the honest payment of honest debts, abjured all fiscal vagaries and socialistic infatuations, and steered the straight course of honor and integrity and dependability which has led to a prestige and a credit that are supreme and unassailed throughout the world.

In the assessment of taxes, Hamilton believed in tempering the burden, so far as possible, to the ability to pay. This axiom has lost none of its soundness with the passage of time. *The Federal-*

<sup>1</sup> *The Federalist*, No. 10.

ist<sup>1</sup> prescribed it as a "fixed point of policy in the National administration to go as far as may be practicable in making the luxury of the rich tributary to the public treasury, in order to diminish the necessity of those impositions which might create dissatisfaction in the poorer and most numerous classes of society. Happy it is when the interest which the Government has in the preservation of its powers, coincides with a proper distribution of the public burdens, and tends to guard the least wealthy part of the community from oppression." It might be well for those who try to regard Hamilton as a votary of the money-power, to read those lines again. What convincing answer to petty slanders! This man who did not hesitate honestly to proclaim the necessity, in any ordered society, of defending "the security of private rights"<sup>2</sup> was equally honest and plain-spoken in demanding that wealth should pay all its legitimate toll by way of tax-compensations to the Government which gave it security and the opportunity to thrive. Such a position was—and is—invincible among men who think straight and are square with their Government and with society.

Hamilton was relentless in his quest for admin-

<sup>1</sup> No. 36.

<sup>2</sup> *The Federalist*, No. 26.

istrative efficiency in public affairs. He abhorred waste and extravagance and political plunder-bounds. He cut to the bone in figuring official personnel and appropriations. To-day's "rising tide of Government"—partially receding, but still staggering in back-wash—would have moved him into uncompromising opposition.<sup>1</sup> He believed that taxes should be held to the lowest levels consistent with progressive public service. But he insisted that when this point was established, there must be no questioning—not so much as the shadow of a doubt—the Federal levies. "A Nation cannot long exist without revenues," said *The Federalist*.<sup>2</sup> "Destitute of this essential support, it must resign its independence, and sink into the degraded condition of a province." It was his idea, however, that "it is impracticable to raise any very considerable sums by direct taxation"; and—in the light of present-day debates over methods for raising vast public revenues with least inequity and irritation—it becomes highly pertinent to observe what he would say, by way of repetition, if he were here to-day.<sup>3</sup>

<sup>1</sup> There were 438,000 Federal employees prior to 1917. The War carried this total, exclusive of fighting men, to 917,700. At last count, October, 1922, there were 560,800 upon the rolls.

<sup>2</sup> No. 12.

<sup>3</sup> *The Federalist*, No. 21.

"Imposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will, in time, find its level with the means of paying them. The amount to be contributed by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources. The rich may be extravagant, the poor can be frugal; and private oppression may always be avoided by a judicious selection of objects proper for such impositions. If inequalities should arise in some States from duties on particular objects, these will, in all probability, be counterbalanced by proportional inequalities in other States, from duties on other objects. In the course of time and things, an equilibrium, as far as it is attainable in so complicated a subject, will be established everywhere. Or, if inequalities should still exist, they would neither be so great in their degree, so uniform in their operation, nor so odious in their appearance, as those which would necessarily spring from quotas, upon any scale that can possibly be devised.

"It is a signal advantage of taxes on articles of consumption, that they contain in their own nature a security against excess. They prescribe their own limit; which cannot be exceeded without defeating the end proposed—that is, an extension of

the revenue. When applied to this object, the saying is just as it is witty, that 'in political arithmetic, two and two do not make four.' If duties are too high, they lessen the consumption; the collection is eluded; and the product to the treasury is not so great as when they are confined within proper and moderate bounds. This forms a complete barrier against any material oppression of the citizens by taxes of this class, and is itself a natural limitation of the power of imposing them."

These considerations might well be given the modern attention which their logic deserves. There never was and there never will be a sounder American economist than Alexander Hamilton. There is no field, other than economics, where he would be more useful if he were here to-day.

Since modern economics substantially involve America's relationship with Europe, it is undoubtedly proper to linger a moment, at this juncture, upon what Hamilton deemed appropriate liaison between the Old World and the New. "Peace and trade with all Nations," was his motto; "but beyond our present engagements, political connections with none." It is inconceivable that a man who could think continentally as did Hamilton when planning to push our frontiers west to the Mississippi and south to the Gulf, would be a

narrow-visioned provincial, with blinders at his eyes, in this present period of world-wide international economic involvements. But it is equally inconceivable that the putative author of Washington's first great Neutrality Proclamation in 1793, setting us aloof from the Franco-British War and fixing our permanent propriety as independent of foreign faction, would for one moment sanction any modern partnership between America and Europe. It is inconceivable that the warning against "entangling alliances" which Hamilton wrote into Washington's Farewell Address<sup>1</sup> would

<sup>1</sup> William Roscoe Thayer, in his *George Washington*, points out that this phrase "entangling alliances" does not appear in the Farewell Address at all. Here, however, are two literal quotations: "It is our true policy to steer clear of permanent alliances with any portion of the foreign world. . . . Taking care always to keep ourselves by suitable establishments on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies." Thayer also says: "All Washington's arrangements at a given moment were directed at the needs and likelihood of the moment, and in 1914 he would have planned as 1914 demanded; he would have steered his ship by the wind that blew then and not by the wind that had blown and vanished one hundred and twenty years before." If this intimates that Washington was an opportunist, incapable of consistent fidelity to basic charts regardless of weather, it is borne out by no facts. "In 1914," as in every moment of responsibility when he was at the head of the Republic, there is no question about what Washington

not be reiterated by him as a cardinal American principle, if he were here to-day. It was his passion to make America independent of Europe, and then to divorce European influences from all Western Hemisphere affairs. In the early "Continentalist," he pleaded the coming day when these latter Pan-American immunities should afford the New World untrammeled opportunities to live its own political life, unruffled by alien interferences.<sup>1</sup> *The Federalist*<sup>2</sup> renewed the creed: "We may hope ere long to become the arbiter of Europe in America, and to be able to incline the balance of European competitions in this part of the world as our interest may dictate." As for the reciprocal elements of independence, this same Federalist sounded clarion call, not only to the young Republic, but to all

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would have done? He would have summoned the counsels of Alexander Hamilton, and these counsels would have taken their inspiration from the spirit of the Constitution, "in 1914" or any other year.

<sup>1</sup> This was the first promulgation of the "Monroe Doctrine," later to immortalize the name of a President who borrowed it from Hamiltonian philosophy. Says Oliver's *Essay on American Union*: "The spectacle of Monroe, the defeated but undiscouraged assailant of Hamilton's private honor and public policy, roaring most nobly to all the ages out of the stolen skin of 'The Little Lion,' is possibly the crowning triumph of a great idea."

<sup>2</sup> No. 11.

generations that should inherit the benefits of unentangled freedom: "Let Americans disdain to be the instruments of European greatness! Let the thirteen States, bound together in a strict and indissoluble Union, concur in erecting one great American system, superior to the control of all trans-atlantic force or influence, and able to dictate the terms of the connection between the Old and the New World."

One of the major reasons which *The Federalist* unremittingly urged for adequate military and naval defenses, was the desirability of possessing a National strength equal to these National ideals, to the end that our obvious power should cause our independence of foreign turmoil and our neutrality in the midst of it, to be acknowledged and, thus, to be unquestioned and pacifically respected. "The rights of neutrality will only be respected when they are defended by an adequate power. A Nation, despicable by its weakness, forfeits even the privilege of being neutral. . . . Our commerce would be a prey to the wanton intermeddling of all Nations at war with each other; who, having nothing to fear from us, would with little scruple or remorse supply their wants by depredations on our property as often as it fell in their way."<sup>1</sup>

<sup>1</sup> *The Federalist*, No. 11.

Some of these observations, let it be parenthetically said, sound as though written in the midst of our vain efforts to maintain early neutrality during the recent World War. We do not discuss the question whether this early neutrality was right: we recall merely that it was impossible—largely for the reason of an unpreparedness which *The Federalist* warned would make neutrality impossible. “Should a war be the result of the precarious situation of European affairs, and all the unruly passions attending it be let loose on the ocean, our escape from insults and depredations, not only on that element, but every part of the other bordering on it, will be truly miraculous.”<sup>1</sup> That could have been said the day Austrian nobility was assaulted at Sarajevo in 1914, as truthfully as in 1787. “A cloud has been for some time hanging over the European world. If it should break forth into a storm, who can insure us that in its progress a part of its fury would not be spent upon us? No reasonable man would hastily pronounce that we are out of its reach.”<sup>2</sup> A fact then; a fact in '14; a fact in 1923. Hamilton believed in looking these facts fearlessly in the face—a habit too little maintained, unfortunately, in subsequent

<sup>1</sup> *The Federalist*, No. 41.

<sup>2</sup> *The Federalist*, No. 34.

and recent eras of uncertainty, expediency, and drift. Can there be any mistake in deductions assuming to conclude what he would say and do if he were here to-day? He believed in an intelligently self-reliant Americanism, as independent abroad as it is at home. He believed in scrupulously denying ourselves to any entanglements not dictated by our own inclinations and welfare. In determining what our welfare is, he did not hesitate to consider situations in Europe and assess their possible relationship to our own posture. His allegiance stopped at the American shore-line; but his vision roamed the world. He was not the astigmatized isolationist who fools himself into thinking that America is wholly immune to the effects of eruption, economic or political, in other continents. Neither was he the anæsthetized internationalist who dreams himself into the notion that America must make common lot with all the uneasy, quarrelsome—and frequently imperialistic—powers on earth. His unremitting effort, if he were here to-day, would be to determine the extent to which American economic welfare is contingent upon Old World vicissitudes, and then to serve this economic need as a matter of enlightened National selfishness. But his unswerving counsels would compromise with no program seeking to tie

American destiny into the political fates of the Old World, or to make us party, directly or indirectly, to any compelling moral obligations that involve trans-oceanic partnerships. He would say again that, as Europe should keep out of America, so America should keep out of Europe unless Americanism itself is to be served by voluntary exceptions to this age-old rule. His "League of Nations" primarily would be Pan-American, not inter-Continental.

In so far as "isolation" implied American immunity to foreign contagions, Hamilton was its devotee and advocate. He was everlastingly wedded to that idea that the indivisible fidelity of American citizens should inure exclusively to the land of the Stars and Stripes. There were no hyphens in his heart or soul. "We are laboring hard to establish in this country principles more and more National," he wrote, "and free from all foreign ingredients, so that we may be neither 'Greeks nor Trojans,' but truly Americans."<sup>1</sup> If he were here to-day, he would endorse, re-echo, and promote every doctrine of this character which found its most recent and dynamic exponent in the late lamented Theodore Roosevelt.

Like Roosevelt, too, he would be a man of peace

<sup>1</sup> Letter to Rufus King, December 16, 1796.

as well as war. His committal to neutrality in the Franco-British ruction proved this inclination. He believed in the pacific composition of disputes. His recommendation of a Treaty Mission to England—at the very moment when he was denouncing Britain's outrageous aggressions on our commerce, and was demanding that the country be put under preparation for effective war—demonstrated his pacific preferences. Keenly he realized the awful economic burden which war flung upon the backs of present and future generations. It sounds almost like an argument at the Washington Conference of 1921-22 when *The Federalist*<sup>1</sup> points out: "In the kingdom of Great Britain, where all the ostentatious apparatus of monarchy is to be provided for, not above a fifteenth part of the annual income of the Nation is appropriated to the civil expenses; the other fourteen-fifteenths are absorbed in the payment of the interest of debts contracted for carrying on the wars in which that country has been engaged, and in the maintenance of fleets and armies."<sup>2</sup> There can be no doubt that

<sup>1</sup> No. 34.

<sup>2</sup> *The Literary Digest*, November 12, 1921, was pointing out that in the 1920 expenditures of the United States, 92.6 per cent—or approximately this same fourteen-fifteenths to which *The Federalist* referred—was paying for past wars or wars to come.

a statesman and economist who thought of war in these terms would eagerly embrace America's modern Treaty program for a "Naval Holiday," for arbitral engagements in which we yield no essential self-determination, and for every possible legitimate release from the thraldom of a voracious Mars.

But if Hamilton were here to-day, he would urge, with all the earnestness at his command, that America take nothing for granted in these respects; in other words, that she constantly maintain herself on a preparedness basis of adequate National defense—adequate, that is, in ratio, reduced or otherwise, with the armaments of other powers. Next to its persistent admonitions against the danger of multi-phased faction, *The Federalist* had more to say of menace on this score of idealistic and impractical pacifism than of any other single subject. "Let us recollect that peace or war will not always be left to our own option; that, however moderate or unambitious we may be, we cannot count upon the moderation, we cannot hope to extinguish the ambitions of others. . . . To judge from the history of mankind, we shall be compelled to conclude that the fiery and destructive passions of war reign in the human breast with much more powerful sway than the mild and be-

neficient sentiments of peace; and that to model our political systems upon speculations of lasting tranquillity is to calculate on the weaker springs of the human character.”<sup>1</sup> How bitterly true we found all that to be, in the wake of the *Lusitania*’s destruction! “If a Federal Constitution could chain the ambition or set bounds to the exertions of all other Nations, then indeed might it prudently chain the discretion of its own Government, and set bounds to the exertions for its own safety. . . . The means of security can only be regulated by the means and the danger of attack.” In other words, we must avoid the menace of unshared idealism—“the paradox of perpetual peace.”<sup>2</sup> “The steady operations of war against a regular and disciplined Army can only successfully be conducted by a force of the same kind.”<sup>3</sup> We learned that lesson all over again within the last bloody decade. God only knows how many thousand men we sacrificed to the murderous notion that a good soldier needs nothing more than a willing heart! This theory of resting American defense upon the untrained fidelities of “a million men springing to arms overnight” is the treachery of nonsense. “The facts which, from our own experience, forbid a reliance

<sup>1</sup> *The Federalist*, No. 34.

<sup>2</sup> *Ibid.*, No. 6.

<sup>3</sup> *Ibid.* No. 25.

of this kind, are too recent to permit us to be the dupes of such a suggestion."<sup>1</sup> Adequate National defense, legitimately proportioned to the defenses of other world powers, continues to be a necessity which Hamilton would preach—to put and keep the United States "in such a situation as, instead of inviting war, will tend to repress and discourage it."<sup>2</sup> Then will foreign powers "be much more disposed to cultivate our friendship than to provoke our resentment"<sup>3</sup> and, let it be added, much more disposed to follow us in concerts that seek world-wide limitations upon these armaments which, otherwise, we are in position dominantly to use against them.<sup>4</sup>

In all things, if Hamilton were here to-day, he would urge upon his compatriots, whether in or

<sup>1</sup> *The Federalist*, No. 25.

<sup>2</sup> *Ibid.*, No. 4.

<sup>3</sup> *Ibid.*, No. 4.

<sup>4</sup> China, for example, would have been a pathetically impotent host, if attempting to sponsor an international Conference to Limit Armaments. *The Federalist*, No. 3, uses the following example. "In the year 1685, the State of Genoa having offended Louis XIV, endeavored to appease him. He demanded that they should send their Doge, or chief magistrate, accompanied by four of their Senators, to France, to ask his pardon and receive his terms. They were obliged to submit to it for the sake of peace. Would he on any occasion either have demanded or have received the like humiliation from Spain, or Britain, or any other powerful Nation?"

out of public office, that they take their public obligations seriously, and realize that they are the custodians of a priceless trust—the boon of ordered liberty. Nothing would more sharply challenge his wrath than the contemplation of citizens who neglect to vote, or public servants who stoop to venal gains. The two are in direct conspiracy because the latter control elections when the former forget that the ballot is a responsibility as well as a privilege. We have entirely too many "good citizens" who cherish the narrow notion that the goodness or the badness of citizenship is determined by the two sides of jail doors; too many more who look upon election morning as a dreadful nuisance—a useless intrusion upon their divine right to concentrate uninterrupted attention upon their acquisition of gold; too many more who are noisy fire-side critics of the "politics" which they neglect to help purge. By the same token, we have entirely too many public servants who are parasites, if nothing worse.

Hamilton gave himself wholly and unconditionally to his country. Not even his bitterest biographer would dare deny his scrupulous integrity in these respects.<sup>1</sup> He believed in taking

<sup>1</sup> In the unsavory Reynolds incident, he even chose to lay bare the full detail of an early mesalliance, at the expense of

Americanism seriously; not as a sort of bi-product to business and society. To this end he set an illustrious example. "I believe it may be laid down as a general rule," said *The Federalist*,<sup>1</sup> "that the people's confidence in and obedience to a Government will commonly be proportioned to the goodness or badness of its administration." But this is a two-edged sword. The "goodness or badness" of administration, in turn, is commonly to be proportioned to the vigilance and intelligent activity of an informed electorate. It is an endless cycle. The citizen is no less required to be faithful to his trust—a very specific and fundamental trust in a Government which the people absolutely control—than is the official whom his ballot commissions to a public task. The recreance of the one is no more palatable than the malfeasance of the other.<sup>2</sup> The

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excruciating personal humiliation, rather than permit his disingenuous enemies treacherously to pretend that payments to Reynolds involved his prior exploitation of a public trust. Indeed, the Reynolds woman created the occasion for as perfect a display of high moral courage, by Hamilton, as any history records.

<sup>1</sup> No. 27.

<sup>2</sup> From Jefferson City, Missouri, July 15, 1922, was reported a proposal by Judge W. T. Johnson of Kansas City, delegate to the Missouri Constitutional Convention, making it a misdemeanor, punishable by a fine or jail sentence, for failure to vote. "The number of indifferent persons who refuse to vote is growing constantly," said Judge Johnson.

occasional infidelity or ineptitude of the official, however, has finally made "politics" so much of a hissing and a scandal that the typical citizen all too frequently looks upon it as a thing to be shunned as though it were a plague.

This situation must change. If the only method through which a Representative Government can function, is "politics," then "politics" is the most sacredly honorable of all civil activities. When the citizen places higher value on his suffrage, the official is likely to accept heavier responsibility under his trust. The endless cycle again! "It may be urged," said a recent writer, "that the Republic has not worked perfectly. The answer is that it is not the fault of the form of Government, but of its imperfect application. It has provided by far the best Government of any form that has ever been devised. Problems in mathematics are not always worked correctly, but it is not the fault of the digits."<sup>1</sup> These imperfections lie at the door of citizen and public servant alike. Neither can point to the other and say: "I am holier than thou." Nor can the earnest, patriotic zeals of millions of

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"I think voting should be made compulsory. Some persons say voting is a right. I believe it is a duty." Belgium has had a compulsory voting law for many years.

<sup>1</sup> *Back to the Republic*, by Harry F. Atwood, 49.

affirmatively good citizens, and the high-purposed, conscientious service of thousands of honest officials, save us from the inertia flung upon the country as a whole by the torpor of those minorities which foul their inheritance.

These imperfections are not the fault of "politics," but of the way that "politics" are often ravished. It is not new standards that we need in these respects. It is merely an understanding return to old standards—such standards as found supreme apostrophe in *The Federalist*, and unimpeachable expression in the career of Alexander Hamilton. They left the landmarks. But there are none so blind as those who refuse to see. A citizenship healthily alert, a public service honestly and wisely administered, the Constitution faithfully preserved—this trinity is invincible. "Look unto the rock whence ye were hewn, and unto the hole of the pit whence ye were digged!"

Professor Albert Bushnell Hart of Harvard says that "we have been fed up on our ancestors. . . . We are all getting a little tired of these panegyrics and this indiscriminate praise of everybody born before the year 1800. As to the men in the Revolution, there has grown up hero worship and almost

a process of deification."<sup>1</sup> From this depreciating viewpoint perhaps it has been a tiresome futility to examine *The Federalist* and to discuss what Hamilton would say and do if he were here to-day. But we have injected the latter only to personify the former. It is easier to sense the man than his work. But his work is paramount and secure against disparagements.

Hamilton was not deity. He was a thoroughly human individual with perfectly human weaknesses. But among his weaknesses was never numbered a moment's desertion of the welfare of the Nation or the integrity of the Constitution. These he served with perfect faith and masterful achievement. If America ever tires of such inspiration, it will have lost its soul. We have none too much spirituality, in this materialistic age, at best.

Instead of being surfeited with these "panegyrics," it would be a far more accurate assessment to say that modern generations have found little time and less inclination to linger amid the admonitions of history; and, instead of encouraging this apostasy, the greater service, in an era of flux and tempest, would seem to lie in respectful effort to recall the wisdom which made possible the Great Experiment whose blessings are our inheritance.

<sup>1</sup> Editorial, *New York Times*, October 24, 1922.

When the life of "the man of the most brilliant mind whom we have ever developed in this country"—Theodore Roosevelt's estimate of Hamilton<sup>1</sup>—palls upon our interest, we are threatened with fatty degeneration of the heart. When the Constitution becomes old-fashioned and obsolete, the Republic will enter upon dangerous days. "It is not a new observation that the people of any country, if, like the Americans, intelligent and well-informed, seldom adopt and steadily persevere for many years in an erroneous opinion respecting their interests."<sup>2</sup> Thirteen decades of Americans have found, despite incidental difficulty, that the letter and the spirit of the Constitution are indispensable to their ordered, common weal. We are flatulent egotists indeed—infated with that fatal pride which goeth before a fall—if there is nothing in these throbbing records worthy of study and of emulation.

What Hamilton would say and do, if he were here to-day, is not the measure of infallibility. But those Americans who would abide his counsels, may be sure of their honor, their Republican fidelities, and their legacy of unimpaired Constitutional advantage to posterity. *The Federalist* is not sacro-

<sup>1</sup> *Roosevelt's Letters to His Children*, 103.

<sup>2</sup> *The Federalist*, No. 3.

sanct. But its interpretation of America's Great Charter has yet to be improved upon by the philosophers and statesmen of the subsequent years. Least of all is it to be improved by the intemperate doctrinaire who screams destruction in the name of "progress," or the cunning Jacobin who pleads for "the people" and plots his own aggrandizement at their expense, or the imported heretic who wants to take the White and the Blue from the Republic's banner and leave the sinister Red.

These are the landmarks from which we depart at our peril. Their inscriptions encompass the sum of basic human rights. To borrow from Dr. Johnson, latter-day "reforms" are at best but meteors while Hamilton and *The Federalist* are fixed stars. Government of the PEOPLE, by the PEOPLE, and for the PEOPLE, means THE PEOPLE THEMSELVES—all of them—not a class or group or faction or camorra. It means REPRESENTATIVE DEMOCRACY, in the spirit of the Constitution. It does not mean dominion by wealth, on the one hand, or tyranny by a mob, on the other. It does not mean oligarchies of avarice, nor does it mean the crimson autocracy of demagogues. It does not mean Government by profiteering Bourbons, nor does it mean Government by exploiteering Bolsheviks. It means evolution, not revolution. It

means popular control through the agencies which guarantee sane, sure, deliberate expression of popular judgment. It means Government by LAW and in ORDER, not Government by PASSION and in HASTE. It means Government under the CONSTITUTION, the best friend the PEOPLE ever had.

If Hamilton were here to-day, he would conclude as he did when the last word of *The Federalist*<sup>1</sup> was subscribed:

“Every man is bound to answer these questions to himself, according to the best of his conscience and understanding, and to act agreeably to the genuine and sober dictates of his judgment. This is a duty from which nothing can give him a dispensation. 'Tis one that he is called upon, nay, constrained by all the obligations that form the bands of society, to discharge sincerely and honestly. No partial motive, no particular interest, no pride of opinion, no temporary passion or prejudice, will justify to himself, to his country, or to his posterity, an improper election of the part he is to act.”

<sup>1</sup> No. 85.



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